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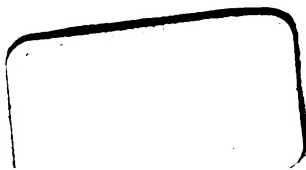
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OF

WASHINGTON

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ERRATA

Page 552, 2d syllabus, line 2, for by read to

ERRORS NOTED IN PREVIOUS VOLUMES

Volume 84

Page 362, foot of page, for 148 Pac. read 146 Pac.

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 12374. Department One. April 6, 1915.]

S. A. BUCK *et al.*, *Appellants*, v. THE TOWN OF MONROE
et al., *Respondents*.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—STATUTORY PROVISIONS. In making local improvements, the general rule that a city must follow the letter of the law, construed strictly against the city does not obtain, in view of 3 Rem. & Bal. Code, § 7892-69, providing that the statute is to be liberally construed for the purpose of carrying out the object for which the act is intended.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REMONSTRANCE—STATUTES. Under 3 Rem. & Bal. Code, § 7892-66, providing that no ordinance for a local improvement shall be effective over the written objection of the owner of a majority of the property affected filed with the clerk "prior to the final passage of such ordinance, unless such ordinance shall receive an affirmative vote of at least two-thirds of all the members of the council or other legislative body of such city or town," it is not necessary for the council to take direct action upon the remonstrance, since the passage of the ordinance by a two-thirds vote subsequent to a hearing of the remonstrance is practically a rejection thereof and a passage of the ordinance by the required vote.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—STREET INTERSECTIONS—POWERS OF COUNCIL. Under 3 Rem. & Bal. Code, § 7892-55, which provides that there shall be included in the cost of a local improvement assessed against property specially benefited the cost of that portion of the improvement included within the limits of any street intersection, the city may include the whole or a part of the intersections to be taxed against the property benefited, or may pay for the whole or a part of such intersections out of its general fund.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—RECORD—VOTE OF COUNCIL. The record on the passage of an ordinance reciting that

¹Reported in 147 Pac. 432.

"the roll was then called on the passage of the ordinance and resulted in all members of the council voting 'Yea' except H., who was absent," sufficiently shows that four of the five councilmen voted for its passage, and hence is not open to the objection that it does not affirmatively appear that it was passed by the necessary two-thirds vote.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered December 9, 1913, in favor of the defendants, in an action to enjoin a public improvement, tried to the court. Affirmed.

C. H. Graves, for appellants.

E. P. Walker and *E. C. Dailey*, for respondents.

MOUNT, J.—This action was brought to restrain the officers of the town of Monroe from improving a portion of Main street in that town, according to a resolution and ordinance which the city had passed for improving this street. It was alleged in the complaint that the ordinance providing for the improvement was passed without authority, and that the work threatened to be done thereunder was, therefore, without jurisdiction. Upon issues joined, a trial was had, and the court denied the injunctive relief prayed for, and dismissed the action so far as it affected this street. The plaintiffs have appealed.

It appears from the record that the town council of the town of Monroe, on December 29, 1911, regularly passed an ordinance entitled, "An ordinance relating to local improvements in the town of Monroe, and repealing all ordinances and parts of ordinances in conflict herewith." Thereafter, on March 26, 1913, the council, upon its own motion, and without a petition of the property owners, passed a resolution declaring its intention to improve by paving a portion of Main street in the town. This resolution provided for the creation of a local improvement district embracing all property benefited thereby, and that the cost of the improvement should be assessed against the property included

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in the district, excepting the cost of paving the street intersections, which it proposed to pay out of the general fund of the town. This resolution further provided that the 23d day of April, 1913, at 8 o'clock p. m. be fixed as a time for hearing objections to the improvement, and directed that all persons interested appear and file written objections at that time.

Notice of the passage of this resolution was duly and regularly published, and before the expiration of the time therein fixed, a large number of property owners, representing a majority of all the property in the district, objected to the proposed improvement. After hearing the objections, both written and oral, the remonstrance was laid over from time to time. Thereafter, on July 9, 1913, the council passed an ordinance, No. 131, ordering the improvement in pursuance of the resolution of intention. This ordinance provided that the cost of the improvement shall be assessed against the property of the district, except the cost of improving the spaces formed by the intersection of the streets, which cost shall be a charge against the general fund, not exceeding \$1,000. This ordinance was passed by more than two-thirds of all the members of the council voting upon roll call.

It is argued by the appellants that these proceedings are irregular and insufficient to confer jurisdiction upon the city council to carry out the proposed improvement, for the following reasons: First, that no consideration was given to, or action taken upon, the remonstrance, as required by law; second, that no authority or jurisdiction exists in the council to pay for any part of the proposed improvements out of the town's general fund; that the mayor and council are proceeding in an arbitrary, unlawful, and oppressive manner against the protests of the property owners; and third, that the cost of the improvement will far exceed the benefits received. We shall consider these objections in the order stated.

It is argued first by the appellants that in making these improvements the city must follow the letter of the law, which will be strictly construed against the city. Some authorities are cited to this effect. Notwithstanding the statute under which towns of this class are authorized to make improvements of this character, Laws of 1911, p. 480, § 69 (3 Rem. & Bal. Code, § 7892-69), provides that the statute shall be liberally construed for the purpose of carrying out the object for which the act is intended, it may be conceded for the purposes of this case that this position is correct.

It is next argued strenuously by the appellants that the council was without authority to make the improvement, by reason of the fact that no action was taken upon, or consideration given to, the remonstrance, as required by law. The facts are, that a remonstrance was filed, and that persons interested in the property affected appeared before the council and objected in writing and orally to the improvement. The council took no direct action upon this remonstrance, but passed it over from time to time. Thereafter the council passed the ordinance providing for the improvement, by a vote of more than two-thirds of the council upon roll call. Section 66 of the act of 1911, p. 479, provides:

“Provided, That in any city or town, other than cities of the first class, no ordinance providing for any improvement herein authorized shall be effective over the written objection or objections of the owners of a majority of the lineal frontage and of the area within the limits of the proposed improvement district filed with the clerk of any such city or town prior to the final passage of such ordinance unless such ordinance shall receive an affirmative vote of at least two-thirds of all the members of the council or other legislative body of such city or town.” 3 Rem. & Bal. Code, § 7892-66.

Counsel seem to rely upon the case of *Buckley v. Tacoma*, 9 Wash. 269, 37 Pac. 446. That was a case where it did not appear that two-thirds of the members of the council voted in favor of the ordinance. In that case this court said:

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"We have treated this question thus far as though the adoption of the report, by vote of eleven members, would have been an equivalent to an order that the improvement be made notwithstanding the remonstrance. But such a procedure would not do. . . . On the contrary the 'order' which the charter requires should be in the form of another resolution reciting the fact that a remonstrance had been filed, and ordering the board to proceed notwithstanding. In no other way is it possible to keep such business from falling into confusion and entailing misunderstanding of authority and consequent loss."

That decision was under a statute which provided:

"But if within ten days after the final publication of said notice the persons owning one-half or more of the lots or parcels of land to be taxed for said improvements shall file with the clerk of the board of public works a remonstrance against said improvement, grade or alteration, the same shall not be made at the expense of the owners of the lots so described, unless the city council by a two-thirds vote of all the members thereof order said improvement made notwithstanding such remonstrance." Tacoma Charter, art. 12, § 135; *Buckley v. Tacoma*, 9 Wash. 253, 258, 37 Pac. 441.

It will be noticed that the statute in force at the time of the decision in the *Buckley* case was different from the one in force now, because the former statute provided that the improvement should not be made unless the city council, by a two-thirds vote of all the members thereof, order said improvement *notwithstanding the remonstrance*; while the statute now in force provides that the improvement shall not be made "unless such ordinance shall receive an affirmative vote of at least two-thirds of all the members of the council or other legislative body of such city or town." This is a material change in the statute, because it does not require the council to take direct action upon the remonstrance. It is necessary now only that the ordinance shall be passed after the remonstrance, and shall receive the assent of two-thirds of the members of the council. The fact that the city council passed the ordinance by a two-thirds vote after the

remonstrance is clearly a rejection of the remonstrance, and effectively passes the ordinance. Practically, and in effect, the council did pass upon and decide against the remonstrance when it disregarded the remonstrance and passed the ordinance by the required vote. *Harney v. Heller*, 47 Cal. 15. The passage of the ordinance by a two-thirds vote was, therefore, sufficient authority for the city to proceed with the improvement.

It is next argued that the council is without power to pay for the improvement of the intersections of the street out of the general fund of the town. Section 55 of the Laws of 1911, p. 475, provides:

"Whenever any local improvement herein authorized shall be ordered, there shall be included in the cost and expense thereof to be assessed against the property specially benefited by such improvement and included in the district created to pay the same, or any part thereof, the cost of that portion of said improvement included within the limits of any street intersection space or spaces, . . ." 3 Rem. & Bal. Code, § 7892-55.

Under this provision there can be no doubt that the city is authorized to include the whole of the intersections, or a part thereof, to be taxed against the property benefited; or that the city may pay out of its general fund for the intersections, or a part thereof. We think there is no merit in this contention.

It is next argued that it does not appear affirmatively that the ordinance authorizing the improvement was passed by the necessary two-thirds vote of the council. The record shows that when the ordinance was passed, "The roll was then called on the passage of the ordinance and resulted in all members of the council voting 'Yea' except Hagedorn, who was absent." This plainly shows that four of the five councilmen voted in favor of the passage of the ordinance, and that therefore it received the required majority. There is nothing in the record to show that the cost of the improve-

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ment will exceed the benefits, even if that question may be considered in this proceeding.

We find nothing in the record to indicate that the city council was without jurisdiction to make the improvement, and conclude, therefore, that the judgment of the trial court was right, and it is affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ., concur.

[No. 12324. Department One. April 7, 1915.]

C. A. HOLMES, *Respondent*, v. H. C. STRONG, *Appellant*.¹

MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE TO WORK—QUESTION FOR JURY. Under the rule that where the servant proceeds to work in a given environment, under a direct order from the master or the master's representative, he does not assume the risks of any dangers not so open and apparent as to be detected by ordinary observation, and that it is a nonassignable duty of the master to see that lumber is piled in such a manner as to make the place reasonably safe for an employee directed to handle it, there was sufficient evidence to present a question for the jury, where it appeared that lumber was piled between decks on a vessel in tiers extending from the deck floor to the top of the compartment, about five feet, nine inches in height; that plaintiff was directed to assist in removing the balance of the timber after the lumber was nearly all out of the ship; that the tiers were apparently straight up and down and plaintiff noticed no danger, although an experienced man in handling lumber; that after two or three boards had been removed from the top of the tier and while plaintiff was at the joint of that tier with another tier, the latter fell, and in attempting to step backward out of the way he was caught by the tier behind him, falling and breaking his leg; there being a dispute upon the facts as to whether the lumber might be safely loaded the way it was, or whether it should have been tied together with cross-strips.

MASTER AND SERVANT—INJURIES TO SERVANT—PROXIMATE CAUSE—INSTRUCTIONS. An instruction in an action for negligence which charges the jury that if they find that the lumber upon which plaintiff was working was piled in a careless and negligent manner, and that it fell upon him without any fault on his part and he did not know of the danger he was in, and if he acted as an ordinary

¹Reported in 147 Pac. 434.

prudent man would have acted under the same circumstances, then their verdict should be for the plaintiff, is not prejudicially erroneous in failing to state that the defendant's negligence must be the proximate cause of the injury, where the plain inference is that, if by reason of defendant's negligence the lumber fell and injured him, he was entitled to recover.

TRIAL—ACTIONS—INSTRUCTIONS—CONSTRUCTION AS A WHOLE. An instruction is not prejudicial as a summing up instruction which fails to contain all the elements necessary to warrant a verdict for the plaintiff, when it does not purport to state the whole law of the case, and is preceded and followed by other instructions, which state the necessary elements.

APPEAL AND ERROR—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE. A reversal will not be ordered for error in the failure of the court to strike testimony which was clearly a conclusion of the witness, where such failure was not prejudicial.

Appeal from a judgment of the superior court for King county, Smith, J., entered February 20, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in unloading lumber from a steamship. Affirmed.

Bronson, Robinson & Jones, for appellant.

Chauncey L. Baxter and J. Will Jones, for respondent.

MOUNT, J.—Action for personal injuries. The plaintiff recovered a judgment on the verdict of a jury in the court below. The defendant has appealed.

The appellant, in the year 1912, was operating the steamship Alki between Seattle, this state, and Ketchikan, Alaska. In March of that year, a cargo of lumber was loaded at Seattle in the between decks of the ship. This lumber consisted of two by twelves, ten by twelves, two by sixes, and two by fours, in lengths varying from sixteen to twenty feet. This lumber was loaded in the vessel by being piled in separate tiers, each tier extending from the deck floor to the top of the compartment, which was about five feet, nine inches, in height. The vessel arrived at Ketchikan on the 31st day of March, 1912, in the afternoon, and the unloading of the

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lumber immediately began. At between 8 and 9 o'clock that night, when the lumber was nearly all out of the ship, the plaintiff was directed to assist one of the men in removing the balance of the lumber. At that time there were three tiers of lumber near the hatch along the side of the ship. Forward of these tiers and also along the side of the vessel were two other tiers. These tiers at the ends abutted against each other. The vessel was well lighted. The plaintiff was an experienced man in handling lumber. The tiers of lumber were apparently straight up and down and the plaintiff noticed no danger therein. After two or three boards had been taken from the top of the tier nearest the hatch and were placed in the package for the sling, and while the plaintiff was at about the joints of the tiers, one of the tiers fell. The plaintiff attempted to step backward out of the way of the falling tier, and was caught by the tier behind him, which fell upon him and broke his leg.

It was alleged in the complaint that the defendant was negligent in loading the lumber because the lumber was not tied together with strips, and because at the bottom of these tiers which fell were narrower pieces than the pieces above, thereby causing the lumber to fall. The case was tried to the court and a jury upon the theory that the defendant was negligent in causing the lumber to be loaded in the manner that it was loaded; and in sending the plaintiff to work in an unsafe place.

The appellant argues that there was not sufficient evidence to go to the jury upon the question of negligence, either in the piling of the lumber or in sending the plaintiff to work in a dangerous place. There was a dispute upon the facts as to whether the lumber might be safely loaded in tiers the way it was loaded, or whether it should have been tied together with cross-strips. The plaintiff testified that he had several years' experience with lumber ladened ships, but that he did not observe that these particular tiers of lumber were unsafe.

We think this case is controlled by the rule announced in *Dumas v. Walville Lumber Co.*, 64 Wash. 381, 116 Pac. 1091. In that case, two inexperienced men were directed to take the lumber from one pile and put it in another. They proceeded to do the work as directed, when one of the piles fell, injuring one of the men. In that case we said:

"The duty to see that the lumber was piled in such a manner as to make the place reasonably safe was a nonassignable duty of the master. The rule announced by this court in the *Zintek* cases is plainly controlling on the evidence here. [Citing a number of cases]."

Mattson v. Eureka Cedar Lumber & Shingle Co., 79 Wash. 266, 140 Pac. 377, was a case where an inexperienced man was directed to take bundles of lumber from trucks and place them upon appropriate piles. One of these piles fell and injured the workman. We there said:

"It is also well established that, when a servant proceeds to work in a given environment, under a direct order from the master or the master's representative, he does not assume the risk of any dangers not so open and apparent as to be detected by ordinary observation. Applying these principles, it is clear that the questions whether the appellant had met its duty to furnish the respondent a reasonably safe place in which to work, and whether the respondent pursued the rule of reasonable prudence in proceeding to work without inspecting the piles of lumber to determine the safety of the place, were, under the evidence, questions for the jury. The following decisions of this court are closely analogous on the facts, and exemplify the application of the principles of law involved. [Citing several cases.]"

Under the rule of these cases, there was sufficient evidence to go to the jury upon the alleged negligence of the defendant.

In instructing the jury the court gave, among other instructions, the following:

"If you find from the evidence that the tier of lumber upon which plaintiff was working was piled in a careless and negligent manner, and that it fell upon him without any fault on

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his part, that he did not know of the danger he was in, and if he acted as an ordinary prudent man would have acted under the same circumstances, then your verdict will be for the plaintiff."

It is insisted by the appellant that this instruction is erroneous first, because it does not state that negligence must be the proximate cause of the injury, and that instructions which do not embody this principle are erroneous. While the instruction itself is not technically correct upon this question, because it does not state in so many words that the negligence, in order to create liability, must be the proximate cause of the injury, yet in substance we think it does do so, and that the jury could not have understood that negligence which had not caused the injury would authorize a verdict in favor of the plaintiff. For the court says in substance to the jury, that if they should find that the tiers of lumber were piled in a negligent manner, and that it fell upon the plaintiff, he would then be entitled to recover. The plain inference is that, if by reason of the negligence the lumber fell and injured him, he was entitled to recover.

In the case of *Moy Quon v. Furuya Co.*, 81 Wash. 526, 148 Pac. 99, the court instructed the jury as follows:

"I instruct you that if you find from the evidence in this case that the servant of the defendant did approach said crossing and did run over and upon and injure said Moy Sue and did fail and neglect to sound any gong, bell or whistle, so as to warn said Moy Sue of the approach of said automobile, the defendant was guilty of such negligence in that behalf as to render him responsible to the plaintiff for damages unless you should find that said Moy Sue was injured by reason of his own contributory negligence, as hereinafter defined."

In that case it was contended that the instruction was erroneous because it failed to tell the jury that if they found the appellant guilty of negligence, they must find that negligence to be the proximate cause of the injury before the plaintiff could recover. Upon this contention we said:

"It is true the instruction did not so advise the jury in terms, but it did, in substance and effect, since it closed with the statement that if the jury found that the respondent was injured by reason of his own contributory negligence, he could not recover."

We think the same rule must be applied in this case, because it is fairly to be understood from the instruction given that the jury must find the negligence complained of caused the injury to the plaintiff.

It is also claimed that the instruction first quoted is prejudicial because it is a summing up instruction, and should have contained all the elements necessary to warrant a verdict in favor of the plaintiff. We do not think it was a summing up instruction, for it does not purport to state the whole law of the case. The court immediately before this instruction had stated to the jury:

"If you find from the evidence in this case that the plaintiff was directed where to work, and worked as directed, I instruct you that such direction carried with it an implied assurance that the place was safe. I further instruct you that plaintiff had a right to rely upon this assurance unless the danger was open and apparent, or the character of the work was such that a reasonably prudent man would have apprehended danger."

And following that instruction, the court said:

"But the servant assumes those risks which are open and obvious and necessarily incident to the work."

And further along in the instructions, the court said:

"If you find that the plaintiff was guilty of contributory negligence and that such contributory negligence on his part contributed to his injury, and was the proximate cause of his injury, then the plaintiff cannot recover."

We think the instructions as a whole, considered in the light of the facts which were being tried to the jury, were substantially correct, and that no prejudicial error occurred therein.

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The appellant also contends that the court erred in refusing to strike out certain testimony. When the plaintiff was upon the witness stand he was asked this question: "Now, if the pile was properly piled up, would it fall down?"

His answer was: "No, it would not." Then he was asked the question: "Was it possible to pile that lumber so that it would not fall? A. Yes, sir, it was."

The appellant objected to this testimony and moved to strike it out, but the objection and motion were denied. He now asserts that this was error. It was clearly the conclusion of the witness; but we think the failure of the court to strike it out was not prejudicial error.

We find no prejudicial error in the record, and the judgment is therefore affirmed.

PARKER, HOLCOMB, and CHADWICK, JJ., concur.

[No. 12410. Department One. April 7, 1915.]

JOSHUA M. GRAY *et al.*, *Respondents*, v. MAE FULLER *et al.*,
Appellants.¹

APPEAL AND ERROR—REVIEW—ASSIGNMENTS NOT BRIEFED. Errors assigned upon the admission and rejection of testimony, not urged in appellant's brief, will not be considered on appeal.

TRIAL—JUDGMENT—CONSTRUCTION AS FINDING. Where the judgment in an action to rescind a sale for fraud recites that the court finds that the sale was induced by the fraudulent representations of the defendants, the same is a finding upon an ultimate fact in the case and the only one in issue, and it cannot be urged that the judgment has no findings of fact to support it.

CONTRACTS—ACTION TO RESCIND—SUFFICIENCY OF EVIDENCE—FRAUD. The evidence is sufficient to show fraud in the sale of a half interest in an employment office, as brought about by fraudulent and misleading representations, where it appears that the defendants advertised the half interest of one partner in an employment office for sale; that plaintiffs sought them out for the purpose of purchase; that defendants represented the business was in good re-

¹Reported in 147 Pac. 402.

pute and profitable, earning from \$15 to \$30 per day, and in the busy season \$50 per day; that plaintiffs bought a half interest and took charge, but soon discovered that the representations were false; that the business was earning nothing; and that, upon discovery that the business was in bad repute and that there were no earnings or profits, they demanded a rescission.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered April 25, 1914, upon findings in favor of the plaintiffs, in an action for rescission, tried to the court. Affirmed.

James L. Crotty (*John T. Casey*, of counsel), for appellants.

Jno. Mills Day, for respondents.

MOUNT, J.—This action was brought to rescind a sale of a half interest in an employment office, and to recover back the money paid therefor, for the alleged reason that the sale was induced by fraudulent representations. The case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiffs as prayed for in the complaint. The defendants have appealed.

The respondents have moved to strike the appellants' abstract, statement of facts, transcript, and the briefs, and for an order to dismiss the appeal. We are satisfied that the case must be affirmed upon the merits, and shall therefore not notice the motion.

The appellants have assigned several errors upon the rulings of the court in admitting and rejecting testimony during the trial. These assignments are not urged in the brief, and we shall for that reason not notice them here.

The appellants urge that the trial court made no findings of fact, and that by reason thereof the judgment should be reversed. The judgment of the court recites:

"It is found by the court that . . . the defendants, Mae Fuller and George P. Rossman . . . fraudulently induced the plaintiffs Joshua M. Gray and Allie Gray, to purchase a one-half interest in said business, good will and

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fixtures . . .; that the said sale and conveyance was brought about by the false and fraudulent statements and representations of the defendants Mae Fuller and George P. Rossman; that upon the discovery of the fraud of the defendants, plaintiffs demanded of said Mae Fuller, the return of their money, and offered to convey, surrender and deliver to her said property and said business;”

It is apparent, we think, that this is the finding of an ultimate fact in the case, and the only one at issue.

The main contention of the appellants is, that the evidence is insufficient to show fraud. It appears from the record that in the month of October, 1913, the appellants were partners, running an employment office in the city of Seattle. An advertisement was inserted in one of the Seattle newspapers offering the interest of the appellant Mae Fuller for sale. The respondents, upon seeing the advertisement, sought out the appellants for the purpose of making a purchase. The evidence of the plaintiffs is to the effect that the defendants at that time represented that the business was in good repute and profitable, was earning from \$15 to \$30 per day, and that in the busy season of the year would take in \$50 per day. They were also informed at that time that a man had just been in the office in answer to the advertisement, and had offered \$400 for a one-half interest in the business, but that he had gone out and would not return until the afternoon. The respondents, relying upon these representations, agreed to, and did, pay the sum of \$335 for a half interest in the business. They immediately took charge, but soon discovered that the representations were entirely false; that the business was earning nothing; and upon discovering that the business was in bad repute and that there were no profits in the business, and no earnings, they demanded a rescission, which was refused. This is the gist of the evidence upon the question, and we think fully sustains the conclusion of the trial court that the sale was brought about by fraudulent and misleading representations.

The appellants also contend that there is no evidence to connect the appellant Rossman with the transaction. It is true there is no evidence that the appellant Rossman obtained any of the proceeds of the purchase price paid by the respondents. But we think there are sufficient circumstances in the case tending to show that he profited thereby, if he was not the real instigator of the transaction. We have read the statement of facts in the case and are convinced that the conclusion of the trial court was right.

The judgment is therefore affirmed.

MORRIS, C. J., PARKER, CHADWICK, and HOLCOMB, JJ.,
concur.

[No. 12293. Department Two. April 10, 1915.]

GUS JOHNSON, *Appellant*, v. GREAT NORTHERN LUMBER
COMPANY *et al.*, *Respondents*.¹

JUDGMENT—ACTIONS TO ENFORCE—LIMITATIONS—FRAUDULENT CONVEYANCES — SUITS TO SET ASIDE — TERMINATION OF LIEN OF JUDGMENT. Under Rem. & Bal. Code, §§ 459-461, limiting the life of a judgment to a period of not more than six years from the date of its entry, an action by a judgment creditor to set aside a fraudulent conveyance and subject the property to the lien of a judgment would be barred, and the action is properly dismissed, after the lapse of six years after the entry of the judgment.

APPEAL AND ERROR—PRESERVATION OF GROUNDS. Errors alleged in the briefs but not disclosed by the record will not be considered on appeal.

Appeal from a judgment of the superior court for Skagit county, Houser, J., entered February 16, 1914, dismissing an action to set aside a conveyance and subject the property to the lien of a judgment. Affirmed.

P. V. Davis and Thomas Smith, for appellant.

Quinby, Beagle & Driftmier, for respondents.

¹Reported in 147 Pac. 641.

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Opinion Per MAIN, J.

MAIN, J.—The purpose of this action is to set aside alleged fraudulent conveyances of certain property and subject the property to the lien of a judgment.

On January 25, 1905, the plaintiff, while in the employ of one of the defendants, the Great Northern Lumber Company, was injured. On April 4, 1905, he brought suit for damages suffered on account of such injury, and on November 19, 1906, obtained a judgment. On November 17, 1905, the Great Northern Lumber Company conveyed all of its assets to the Fraser River Saw Mills, Ltd. On November 23, 1905, the latter company conveyed the property to the Anacortes Lumber & Box Company. On January 20, 1908, the judgment in favor of the plaintiff and against the Great Northern Lumber Company was affirmed by this court. On July 6, 1909, the present action was instituted. After the issues had been framed, the cause was set for trial on February 10, 1914. On February 9, 1914, the defendants Fraser River Saw Mills, Ltd., and the Anacortes Lumber & Box Company, filed a motion to dismiss for the reason that the lien of the judgment of the plaintiff against the Great Northern Lumber Company, upon which this action is predicated, had expired by operation of law. This motion was granted and the action dismissed. From the judgment of dismissal entered on February 16, 1914, the appeal is prosecuted.

From the facts stated, it appears that the judgment against the Great Northern Lumber Company was entered in the superior court on November 19, 1906. The order dismissing the present action was entered on February 16, 1914. It thus appears that the period of time between the entering of the judgment in the original action and the entering of the order of dismissal in this action was more than six years. The statute, Rem. & Bal. Code, §§ 459-461 (P. C. 81 §§ 57-61), limits the life of a judgment to a period of not more than six years from the date of the entry of the original judgment. Upon the authority of the cases of

Meikle v. Cloquet, 44 Wash. 513, 87 Pac. 841, and *Seattle Brewing & Malting Co. v. Donofrio*, 59 Wash. 98, 109 Pac. 335, the judgment of dismissal in the present case must be affirmed.

But the appellant claims that, at the time of the hearing in the superior court upon the motion to dismiss, leave was asked to amend the complaint in such a way that he claims it would state a cause of action. We need not pursue this question further than to say that the record does not show such a request or motion to have been made.

The judgment will be affirmed.

MORRIS, C. J., ELLIS, CROW, and FULLERTON, JJ., concur.

[No. 12318. Department Two. April 10, 1915.]

NORA S. JOHNSON, *Respondent*, v. ADOLPH O. JOHNSON,
Appellant.¹

APPEAL AND ERROR—PRESUMPTIONS—INSTRUCTIONS—CORRECTNESS. Where no question was raised as to the court's instructions, it will be assumed on appeal that, if the cause was one for the jury on the evidence, the instructions correctly stated the law and all of the law applicable.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE. When the defendant's negligence is the proximate cause of the injury for which action is brought, while that of plaintiff is only a mere condition and not an efficient cause of the injury, plaintiff's contributory negligence would not defeat recovery.

MUNICIPAL CORPORATIONS—USE OF STREETS—COLLISIONS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether an automobile colliding with a pedestrian on a street crossing without sounding a warning, was making noise sufficient to advise of its approach, and whether the average person accustomed to the usual street noises could have consciously heard and heeded the noise of the moving machine, are questions for the jury, where the evidence was conflicting on the point that considerable noise was made by the automobile as it approached the crossing where it ran over the pedestrian.

¹Reported in 147 Pac. 649.

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Opinion Per ELLIS, J.

MUNICIPAL CORPORATIONS—INJURIES TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—RIGHT OF WAY. A pedestrian, struck down by an automobile upon a street crossing where, by ordinance, she had the superior right of way, cannot be said, as a matter of law, to have been guilty of contributory negligence in not continuously observing the approach of the automobile, which she perceived a block away and thereafter paid no attention to it when she started to cross a well-lighted street, where her view was not obstructed by the presence of other vehicles, she having a right to assume that the driver would approach at a lawful rate of speed, that he would sound some signal of his approach, that he would observe the city ordinance and state statute as to speed at street crossings prohibiting a speed in excess of four miles an hour when any person was on the crossing, and that he would heed the pedestrian's superior right on the crossing by changing his course or actually stopping.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 18, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an automobile. Affirmed.

Saunders & Nelson, for appellant.

Walter S. Fulton, for respondent.

ELLIS, J.—This is an action for damages resulting from personal injuries to a pedestrian struck by an automobile at a street crossing in the city of Seattle.

It was stipulated in open court that the person driving the car was the minor son of the defendant and that for any negligence on the boy's part the father is liable. The accident happened on September 24, 1913, at about 9:30 o'clock in the evening, at the intersection of Fourth avenue, which runs north and south, and Spring street, which runs east and west. Fourth avenue was well lighted by cluster lights. The plaintiff had walked from Third avenue to Fourth avenue along the north side of Spring street. She testified as follows:

"When I got to the corner I looked right and left as is my custom, and I saw the lights of an auto which apparently had just crossed the Madison street track. I started across

and apparently was nearly across when I realized an explosion or something. There was just a bright glare of lights around me, and I knew nothing more.

"In crossing Fourth avenue I was on the north side of the street, right on the crossing. I noticed nothing unusual in the approach of the machine. I saw the lights and there was nothing unusual. I saw it as it had apparently crossed Madison and, had it been traveling at the usual rate of speed, I would have thought I could have gone over and back. I started with no apprehension of danger at all nor paid no attention to the approach of the machine. There was nothing unusual about it. I had no notice or warning of the approach of the machine. I saw those lights of the machine and the next I knew there was a flare of light. I was struck. . . .

"I did not hear any sound emitted from this machine as it approached me, as I was going across the street, nor any sound of any nature whatever. When I did notice this machine it had evidently just crossed the Madison street car line, a block away."

Another witness testified as follows:

"I saw an automobile cross Madison street going north on the east side of Fourth avenue. My attention was first attracted to it by the noise it was making coming up the street. I first noticed it just before it reached Madison street. The muffler was wide open and, as you know, it makes a loud report when it is going fast. There was a Madison street cable car going up. I was watching as I was expecting a person on that car. This machine passed by this car just in time to avert an accident. That was the first that attracted my attention, was the noise of the machine on the street, coming up the street. The machine was running not a bit less than thirty-five miles an hour and I daresay forty. I was standing at Spring and Fourth avenue. That is one block north of Madison street.

"I was on the west side of the street. I noticed Mrs. Johnson, did not know who she was at the time, but this lady crossing the street, going east on Fourth avenue at Spring street. The machine struck her and from where it struck her to where she landed, I should imagine it was a hundred feet or more. She was on the north side of Spring

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street and I was on the south side. There was no signal whatever given, by horn or any signal. After the machine struck Mrs. Johnson it slowed down to, I should imagine, fifteen or eighteen miles an hour and then the occupants looked back, threw in their clutch and proceeded on their journey."

He also testified that the collision took place right at the crossing, and that when he first heard the automobile he thought it was a fire wagon coming up the street.

Another witness, who at the time of the accident was sitting at a window on the third floor of the Kerma hotel, located on Fourth avenue some distance north of its intersection with Spring street, testified that he heard something that sounded like a collision, "as if a machine or something had run into a wagon or street car;" that he looked out of the window and saw the plaintiff lying in the street directly in front of the window and an automobile going down the street to the north; that in his judgment the automobile was going about thirty miles an hour; that he did not hear any noise of the machine at all except that made by the collision.

The boy, a youth of sixteen, who was driving the automobile, and two other witnesses testified that the machine was running at from ten to twenty miles an hour; that it was making considerable noise, and that the accident happened in front of the Kerma hotel some distance north of Spring street. None of these, nor any other witness, testified that any horn was sounded or other alarm given.

In response to special interrogatories, the jury found: (1) that the plaintiff was walking east when the accident occurred as she was crossing Fourth avenue; (2) that she was struck at the intersection of Fourth avenue with Spring street; (3) that she was not struck at the place where she was found in the street after the accident. The jury also returned a general verdict in favor of the plaintiff and against the defendant in the sum of \$3,500. At appropriate times, the defendant moved the court for a nonsuit, for a verdict in

his favor upon all the evidence, and for a new trial. These motions were overruled. Judgment was entered upon the verdict. The defendant appeals.

No question is raised touching the court's instructions. We must assume that, if the cause was one for the jury on the evidence, the instructions correctly stated the law and all of the law applicable.

It is conceded by the appellant that all his assignments of error raise the single contention that the respondent was guilty of contributory negligence sufficient, as a matter of law, to bar her from recovery. It is further conceded that in passing upon this question we must consider not only the literal statements of witnesses, but every justifiable inference favorable to the respondent which may be drawn therefrom. *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166; *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892; *King v. Page Lumber Co.*, 66 Wash. 123, 119 Pac. 180; *Young v. Aloha Lumber Co.*, 63 Wash. 600, 116 Pac. 4. The appellant asserts that, applying this rule, the following facts must be taken as true:

"(1) That the automobile coming from the south and proceeding north along the east or right hand side of Fourth avenue, approached and ran over the crossing at a high and unlawful rate of speed; (2) that no horn was blown as the automobile approached the crossing; (3) that the driver of the automobile was, in fact, negligent at the time and the place of collision, and that his negligence was the proximate cause of the injury; (4) that the plaintiff, while crossing from the west to the east side of Fourth avenue at the intersection of Spring street with the avenue, was struck, where as a pedestrian she had right of way over the automobile; (5) that the collision occurred in the night time; (6) that at the time of the collision the automobile was running with brilliant headlights burning, throwing rays approximately 150 feet ahead of it; (7) that at the time of the collision and for more than one block before it occurred, the automobile was making a great deal of noise by reason of the fact that the muffler was open, so much noise that it resembled a fire engine; (8) that there were no vehicles or other obstructions

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in the street whatever to intercept the view of the automobile by the plaintiff; (9) that when the plaintiff reached the northwest corner of Spring street and Fourth avenue, she looked both ways and observed the lights of the auto about a block to the south on Fourth avenue; (10) that she started across and was nearly across Fourth avenue when she found herself in a glare of lights around her and was struck; (11) that she had noticed nothing unusual in the approach of the automobile; (12) that she estimated when she saw it that had it been traveling at the usual rate of speed, she would have had time to go across the street and back; (13) that she then started with no apprehension of danger and paid no attention to the approach of the machine; (14) that she is a person of normal faculties with no impairment of sight or hearing; (15) that she was neither confused nor distracted by any other circumstances, and that nothing whatever came between her and the approaching automobile or distracted her attention, or in any way prevented her from glancing in the direction of its approach and governing her progress by its actual, rather than by its presumed movements."

We shall pass the third concession which, if taken literally, would dispose of the case; since if it be conceded that the appellant's negligence was the proximate cause of the injury, then any negligence on respondent's part would be merely a condition and not a contributing or efficient cause of the injury. This was a question for the jury.

"When the defendant's negligence is the proximate cause of the injury, while that of the plaintiff is only a remote cause or a mere condition of it, the action will lie." *Redford v. Spokane St. R. Co.*, 15 Wash. 419, 423, 46 Pac. 650; *Benson v. English Lumber Co.*, 71 Wash. 616, 623, 129 Pac. 403; *Atherton v. Tacoma R. & Power Co.*, 30 Wash. 395, 405, 71 Pac. 39; *Beach, Contributory Negligence* (2d ed.), § 54.

We take it that this concession, taken literally, is broader than intended.

Counsel's effort to be absolutely fair in the foregoing statement of the evidence and legitimate inferences is self-evident, but a careful reading of the evidence makes it

equally obvious that he has overlooked certain inferences fairly deducible therefrom necessitating a vital modification of the 7th, 8th and 15th postulates. Touching the 8th and 15th, while it is true that there was no vehicle or other obstruction to intercept the respondent's view of the automobile, the inference is equally clear, from the same facts, that there was nothing to obstruct the driver's view of the respondent. While it is also true that there was nothing to prevent the respondent's glancing in the direction of the automobile and governing her progress by its actual rather than its presumed movements, it is also true that there was nothing to prevent the driver from glancing in the direction of the crossing and seeing that the respondent was taking a straight course thereon unconscious of the dangerously rapid approach of the automobile, and governing his movements accordingly. The 7th postulate overlooks the inference reasonably to be drawn from the testimony of at least two witnesses. While it is true that one witness testified positively that the automobile was making as much noise as a fire engine, and three others that it was making considerable noise, the respondent testified that she did not hear any noise, and one other witness, who heard the impact when the automobile struck the respondent, testified that he heard no other noise. It cannot be said that, as a matter of law, the machine was in fact making a loud noise as it approached the respondent. The evidence furnishes an inference to the contrary. The question, even if controllingly material, was for the jury.

Even assuming as an established fact that this machine was making considerable noise, the jury might reasonably have inferred, and we believe the inference justifiable, that the average person, not temperamentally timorous nor abnormally cautious, would pay little attention to sounds ordinarily prevailing in a city street other than those habitually recognized and relied upon as intended for warnings. We are not prepared to say that, as a matter of law, the average person

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either would have or should have consciously heard and heeded the noise made by this automobile when no bell or other warning signal was given. The question was one for the jury.

The inquiry is thus narrowed to this: was the respondent, as a matter of law, guilty of contributory negligence in not continuously observing the automobile, which she saw a block distant when she entered upon the crossing, in order to avoid being run down by it? By an ordinance introduced by appellant, the pedestrian is given the right of way over street crossings. By another ordinance, introduced by respondent, automobiles are prohibited from traveling over street crossings in business districts at a rate of speed greater than eight miles an hour. The state law prohibits a greater rate of speed than four miles an hour by automobiles crossing street intersections when any person is thereon. Rem. & Bal. Code, § 5571 (P. C. 33 § 19).

If the burden is placed upon the pedestrian, who when starting across a well-lighted street at a crossing sees an automobile a full city block distant, to thereafter continuously look up and down the street to avoid being run over on pain of being charged, *as a matter of law*, with contributory negligence, then the concession that, *as a matter of law*, the pedestrian has the right of way at such crossings is an empty fiction. No greater care than this constant observation could be required at any other place on the street. The term "right of way" must have some bearing upon the relative rights, hence on the relative care required of the parties. If a pedestrian must exercise the same care of continuous observation at the crossings as in the middle of the block, in order to avoid the charge of contributory negligence when run down by a speeding automobile without sounding a warning, then he has no right of way, but enters upon any part of the street at his own peril. If the conceded right of way means anything at all, it puts the necessity of continuous ob-

servation and avoidance of injury upon the driver of the automobile when approaching a crossing, just as the necessity of the case puts the same higher degree of care upon the pedestrian at other places than at crossings.

The appellant seeks to invoke as a saving virtue the fact that the automobile was running on the right-hand side of the street as prescribed by the law of the road. It is insisted that the respondent "had as much right to presume that the automobile would continue in this course as that it would approach at a lawful rate of speed." This is not the law. It is wholly inconsistent with the positive provisions of the ordinance giving to the pedestrian the superior right upon the street crossing. The respondent not only had the right to assume that the automobile would approach at a lawful rate of speed, but that its driver would sound a horn or give some other signal of its approach and that he would heed her superior right at the crossing and avoid running her down, though it might necessitate a change of course or an actual stopping. As said in *Lewis v. Seattle Taxicab Co.*, 72 Wash. 320, 130 Pac. 341:

"The respondent did not step from the street immediately in front of the automobile, nor did he in crossing the street any time obstruct its path. He was as much in view of the driver of the automobile as the automobile was in his view, and as there was room to pass him on either side, we think it too much to say, as a matter of law, that he was required to take notice of the particular part of the street the automobile driver desired to use, and keep off that particular part."

As said in *Franey v. Seattle Taxicab Co.*, 80 Wash. 396, 141 Pac. 890:

"It is argued that the plaintiff was guilty of contributory negligence in not looking for the automobile. But the evidence shows he was upon the crossing, where he had a right to be. If he had looked and seen the automobile coming, he

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had a right to assume that the driver would not violate the city ordinance in regard to speed, and at that point would be obliged to pass him without running him down."

And again as said in *Chase v. Seattle Taxicab & Transfer Co.*, 78 Wash. 537, 139 Pac. 499:

"The respondent saw the taxicab a block to the south, and proceeded in a uniform course without hesitation or vacillation. Whether his failure to look a second time was such negligence as to prevent a recovery was for the jury."

See, also, *Ludwigs v. Dumas*, 72 Wash. 68, 129 Pac. 903; *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821; *Tschirley v. Lambert*, 70 Wash. 72, 126 Pac. 80.

All of these are automobile cases in which we have consistently adhered to the rule that a pedestrian, though seeing an automobile at a considerable distance, may proceed to cross the street at the crossing in a uniform course without hesitation or vacillation, without being charged with contributory negligence as a matter of law.

The case of *Minor v. Stevens*, 65 Wash. 423, 118 Pac. 313, 42 L. R. A. (N. S.) 1178, is not averse to the views here expressed. In that case the judgment was reversed because it affirmatively appeared that the jury had failed to determine the question of contributory negligence on the facts there presented and submitted by the court's instructions. That decision, however, does recognize as unquestioned law that a higher degree of care, by reason of the dangerous character of the vehicle, rests upon the driver of an automobile at street crossings than upon the pedestrian.

The case of *Borg v. Spokane Toilet Supply Co.*, 50 Wash. 204, 96 Pac. 1037, 19 L. R. A. (N. S.) 160, is inapplicable to the facts here for two reasons. In the first place, the pedestrian was there crossing the street diagonally in the middle of the block, hence had no superior right; in the second place, the offending instrument was a horse-drawn

vehicle, not of the same dangerous character as an automobile.

In the case of *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471, which goes as far as any decision of this court in holding lack of observation contributory negligence as a matter of law, we again find involved an ordinary wagon and team. The pedestrian, neither before nor while crossing the street, looked in either direction, but proceeded with an umbrella in such a position as to prevent any observation of his surroundings on his part.

We shall not dwell upon the street car cases cited and mainly relied upon by the appellant, further than to restate what we said in *Lewis v. Seattle Taxicab Co.*, *supra*:

"The degree of care required of a pedestrian crossing a railroad or street car track is much higher than is the care required of one crossing an ordinary public street where only passing teams or automobiles are to be encountered. Railroad trains and street cars must move on a fixed track, and the track is, for that reason, at once a warning of danger and a marking of the zone of safety; the cars are heavy and cumbersome and cannot turn aside to avoid a collision or be brought quickly to a stop when once in motion; hence the persons directing the movements of such cars are limited in their powers to protect persons found upon the track. But this is not true with reference to ordinary vehicles. The driver of these has freedom of choice as to the part of the street he will drive them upon; they can be turned quickly to one side or the other, and are capable of easy control otherwise. As to these, therefore, the footman may rely on the presumption that, so long as he occupies one place or pursues a given course, he need not be run into, and to fail to keep a lookout for the approach of such vehicles is not necessarily want of care."

See, also, *Skaala v. Twin Falls Logging Co.*, 82 Wash. 679, 144 Pac. 897.

Appellant's negligence being conceded, it seems to us that, in any view of the evidence, the questions of respondent's

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negligence, and whether, if she was negligent, that negligence was the proximate or efficient cause of the injury, were for the jury.

The judgment is affirmed.

MORRIS, C. J., CROW, MAIN, and FULLERTON, JJ., concur.

[No. 12397. *En Banc*. April 10, 1915.]

THE STATE OF WASHINGTON, *on the Relation of the Public Service Commission, Appellant*, v. SKAGIT RIVER TELEPHONE & TELEGRAPH COMPANY *et al.*,
Respondents.¹

EMINENT DOMAIN—COMPENSATION—REGULATION BY PUBLIC SERVICE COMMISSION. While the public service commission has plenary powers to regulate all public utilities within the state, it has no power, under a pretended public use or a pretended exercise of the police power of the state, to so regulate as to amount to an appropriation of property, without just compensation being first made and paid to the owner.

TELEGRAPHS AND TELEPHONES—REGULATION—PUBLIC SERVICE COMMISSION. In a mandamus proceeding by the public service commission to compel certain telephone companies to comply with an order requiring them to make physical connection so as to transmit one another's messages, the commission cannot urge that one of the companies, which had been dismissed as a party to the proceedings before it, has no right to be heard in the mandamus proceeding because of its failure to cause the proceedings before the public service commission to be reviewed, as required by 3 Rem. & Bal. Code, §§ 8626-86 and 8626-99, which declares conclusive the orders of such commission unless set aside or annulled in proceedings to review the orders; since it had been dismissed and its rights were not affected, and since in such proceedings the commission was acting judicially, and its orders, if not erroneous merely but made without authority and void, would be subject to collateral attack.

TELEGRAPHS AND TELEPHONES—PUBLIC SERVICE COMMISSION—REGULARITY OF ACTION—PRESUMPTIONS. Where it is sought by mandamus to compel compliance with the orders of the public service commission requiring physical connection of two telephone systems and the

¹Reported in 147 Pac. 885.

transmission of messages of one over the lines of the other, the presumption of regularity and validity attaches to the order, and the burden is upon the defendants to show the unreasonableness and lack of necessity of the commission's order; and hence it was proper to permit defendants to introduce evidence tending to show that the order was contrary to law, and that the effect of the order would be to deprive the defendants of their property in violation of the fourteenth amendment to the Federal constitution.

TELEGRAPHS AND TELEPHONES — REGULATION — CONNECTING LINES. Where one telephone company has by contract opened its lines to physical connection and services for another telephone company upon certain terms, its act is equivalent to a declaration of a purpose to waive its primary right of independence, and it can be required, as a state regulation within the police power, to accord the same facilities, conveniences and uses to other telephone companies upon equal terms.

TELEGRAPHS AND TELEPHONES — REGULATION BY PUBLIC SERVICE COMMISSION — ORDERING CONNECTION — APPROPRIATION OF PROPERTY WITHOUT COMPENSATION. An order of the public service commission for the physical connection of two telephone companies and the transmission of messages of each over the lines of the other, without any provision being made for compensation, either as tolls for temporary service, or for the cost of the physical connection, or for the permanent use of the lines and facilities of either of the said companies, is void as an attempted taking of private property without due compensation, in violation of art. 1, § 16, of the state constitution and of the fourteenth amendment of the constitution of the United States.

SAME. While the public service commission has power to order such a physical connection, it must be without discrimination, with provisions for the payment of the cost, and reasonable regulations.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered August 15, 1914, dismissing an action to compel the enforcement of an order of the public service commission requiring physical connection between the lines of telephone companies, after a trial before the court. Affirmed.

The Attorney General and Scott Z. Henderson, Assistant, for appellant.

Hughes, McMicken, Dovell & Ramsey and Otto B. Rupp (Pillsbury, Madison & Sutro, of counsel), for respondents.

HOLCOMB, J.—Upon a complaint by the commercial club of Sedro-Woolley, made before the public service commission on May 1, 1913, proceedings were had, resulting in an order by the public service commission requiring that a connection be made between wires of the Skagit River Telephone & Telegraph Company, hereinafter called the Skagit company, and the Puget Sound Independent Telephone Company, hereinafter called the Independent company, at the eastern limits of Sedro-Woolley. The Skagit company is a Washington corporation, owning and operating a telephone line extending easterly from the easterly limits of Sedro-Woolley, through the valley of the Skagit river, and through the towns of Lyman, Hamilton, Concrete, and Rockport. This company maintains no central station at Sedro-Woolley, but at the city limits its lines are connected with those of the Pacific Telephone & Telegraph Company, hereinafter called the Pacific company. This connection exists by virtue of a contract between these two companies. The Pacific company is a California corporation, owning and operating a telephone system extending generally throughout the Pacific Coast states. Its lines extend into Skagit county and as far east as Sedro-Woolley, at which point it maintains a central station, and connects there, as stated, with the lines of the Skagit company at the easterly limits of the city. The Independent company is a Washington corporation, owning and operating a rather extensive telephone system in the counties of King, Snohomish, and Whatcom, and through the county of Skagit as far east as Sedro-Woolley, at which point it maintains a central station. Its lines are not connected with those of the Skagit company at Sedro-Woolley or elsewhere.

As a result of the connection between the lines of the Skagit company and the Pacific company, all persons and localities served by one company can freely communicate by telephone with persons and localities served by the other. The lines of the Skagit company extend east from Sedro-

Woolley. The lines of the Independent company extend west from Sedro-Woolley, and these lines are not now, and never have been, connected. Each reaches localities not reached by the other. In the territory west of the easterly limits of Sedro-Woolley, through which the lines of the Pacific company and the Independent company radiate, all localities reached by the Independent company are also reached by the Pacific company, but there are numerous individual subscribers of the Independent company who do not have the Pacific company's telephone. Likewise, there are numerous subscribers to the Pacific company who do not have the Independent company's telephone. Only such persons in the territory west of Sedro-Woolley as have Pacific telephones are able to communicate with persons east of Sedro-Woolley on the lines of the Skagit company. At the hearing before the public service commission, the three telephone companies participated. The public service commission made and adopted findings, the most important of which appears to be finding No. 19, as follows:

"That by means of such physical connection between the Pacific Telephone & Telegraph Company's lines and those of the Skagit River Telephone and Telegraph Company, *there now exists a continuous line of communication between the localities served by the Skagit system, and all localities within telephonic distance thereof served by the Pacific system, including all of the localities reached by the lines of the Independent system,* [italics ours] but no continuous line of communication exists between the lines of the Puget Sound Independent Telephone Company and the lines of the Skagit River Telephone and Telegraph Company. That a necessity exists for a continuous line of communication between the localities served by the Skagit River Telephone Company and the localities served by the Puget Sound Independent Telephone Company, and for a physical connection between the lines of said Skagit River Telephone and Telegraph Company and said Puget Sound Independent Telephone Company at or near the eastern limits of the city of Sedro-Woolley in Skagit county, Washington. From a consideration of all the evidence, the commission finds and concludes

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that the lines of the Skagit River Telephone and Telegraph Company and the Puget Sound Independent Telephone Company can, by the construction and maintenance of suitable connection at or near the eastern limits of the city of Sedro-Woolley, be made to form a continuous line of communication between localities that are not reached by the lines of either company alone; that such connection for the transmittal of conversations and transfer of messages can reasonably be made, and efficient service obtained, and a necessity exists therefor."

Based upon the foregoing findings, the commission made the following order:

"Wherefore, it is ordered, that the Puget Sound Independent Telephone Company and the Skagit River Telephone and Telegraph Company be, and such companies are hereby ordered and directed to make physical connection between the telephone lines of said companies at or near the eastern limits of the city of Sedro-Woolley, Washington, so as to form a line of continuous communication for the transmittal of conversations and the transfer of messages between the localities served by the Puget Sound Independent Telephone Company and the localities served by the Skagit River Telephone and Telegraph Company, and that such physical connection be made within thirty days after the service upon said telephone companies of a certified copy of this order, and said companies are ordered and directed to thereafter transmit conversations and transfer messages between said localities, or show cause, if any there be, why such connection cannot reasonably be made within said time. It is further ordered, that the complaint in this case, in so far as the same relates to or affects the defendant, Pacific Telephone and Telegraph Company, be, and such complaint hereby is dismissed."

It will be noticed that, although the Pacific company was a party to the proceeding before the commission, the order required nothing of it, and as to it the complaint was dismissed. No action to review the findings and order of the commission was prosecuted by any of the telephone companies involved, as provided by § 86 of the public service

commission law (Laws of 1911, ch. 117, pp. 538, 596; 3 Rem. & Bal. Code, § 8626-86). An agreement between the Pacific company and the Skagit company was exhibited in evidence, under which it was shown the Pacific company constructed and operates a pair of telephone wires from Mount Vernon easterly to Sedro-Woolley, and at the easterly limits of Sedro-Woolley these lines connect with a pair of telephone wires constructed and operated by the Skagit company easterly from Sedro-Woolley to Concrete.

After the said order was made by the commission, the Independent company indicated, and still indicates, its willingness to comply with the order, but the Skagit company failed and refused to comply with the order, and the Pacific company commenced a suit in equity in the Federal court for the western district of Washington, for the purpose of having the enforcement of said order permanently enjoined. The Skagit company, the Independent company, and the members of the commission were made defendants in that action. This suit was one that fell within the provisions of § 266 of the Federal Judicial Code as amended (U. S. Stats. at Large, 62d Cong. vol. 37, p. 1013), by the terms of which if, before the final hearing of the application for preliminary, provisional, and perpetual injunctive relief, a suit shall have been brought in the courts of the state having jurisdiction thereof under the laws of such state to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state. Therefore, the commission elected to have the validity of its order determined in the state courts. Accordingly, this mandamus action was commenced in the superior court of Thurston county, to compel the observance of the order the enforcement of which the Pacific company sought to enjoin in the Federal

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court. The pendency of the mandamus action in the state court being made to appear in the Federal court, the controversy was there stayed until the determination by the state courts.

Upon the controversy being thus waged in the state courts, the three telephone companies filed separate answers to the commission's petition. The answer of the Pacific company asserts, in effect, that the order of the commission is void and unenforceable, (1) because not within the power conferred on the commission by the public service commission law; (2) because violative of the obligation of the connective agreement between the Pacific company and the Skagit company; (3) because, if enforced, the order would operate to deprive the Pacific company of its property without due process of law, in contravention of the state and Federal constitutions. It also, by its answer, claimed that the order, if enforced, would constitute an unlawful interference with interstate commerce. This objection, however, was not urged at the trial below. The Skagit company, by its answer, asserts that it refused to comply with the order of the commission because it deems the exclusive agreement between itself and the Pacific company a valid and subsisting contract binding upon both parties thereto, and the order of the commission, in conflict therewith, null and void. The Independent company, by its answer, admits the material allegations of the commission's petition for the writ, and states its willingness to comply with the order unless restrained from so doing or prevented by the refusal of the Skagit company. The reply of the commission puts in issue all the affirmative matters in the answer of the Pacific company. After a trial before the court below, the writ of mandate prayed for was refused and the case dismissed. From such judgment of dismissal, this appeal is prosecuted.

The validity of the order made by the public service commission is questioned on two general grounds, (1) that it is

beyond the statutory power conferred on the commission; (2) that it is in excess of any power that could constitutionally be conferred upon the commission. The trial court apparently based his decision upon the first ground alone.

The proceeding before the commission was based on § 73 of the public service commission law, being chapter 117, Laws of 1911, p. 585. That section is as follows:

"Whenever the commission shall find that any two or more telephone companies, whose lines form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections for the transfer of messages or conversations at common points between different localities which are not reached by the line of either company alone, and that such connections or facilities for the transfer of messages or conversations at common points can reasonably be made, an efficient service obtained and that a necessity exists therefor, . . . the commission may, by its order, require such connection to be made, and that conversations be transmitted and messages transferred, and prescribe through lines and joint rates and charges to be made, and to be used, observed and in force in the future, and fix the same by order to be served upon the company or companies affected." 3 Rem. & Bal. Code, § 8626-73.

That the public service commission has plenary powers to regulate all public utilities within the state has been thoroughly established and determined in this state and requires no citation of authority. The power to regulate, however, is widely different from the power to appropriate or to take. While the commission is a mandatory agency of the state, neither it nor the legislature which gave it its power has power to regulate in violation of any of the provisions of the fundamental law of the state or nation, and neither the legislature nor its agent, the commission, has power to appropriate property under a pretended public use or a pretended exercise of the police power of the state without just compensation being first made and paid to the owner thereof. U. S. Const., 14th Amendment; State Const., art. 1, § 16.

Under the provision of our constitution, art. 1, § 16,

“Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.”

It must be determined, therefore, whether the requirement of the public service commission of the connection of the lines of these two telephone companies is a valid regulation, or whether it is a taking or damaging of the property of one of the companies without due process of law, or without compensation being first made and paid to the owner.

I. The appellant first contends that the Pacific company has no right to be heard now, because it did not cause the proceedings before the public service commission to be reviewed, as provided by §§ 86 and 99 of said chapter 117, Laws of 1911, pp. 596, 608 (3 Rem. & Bal. Code, §§ 8626-86, 8626-99). One answer to this is that the Pacific company was dismissed by the public service commission in the proceeding before it, and the order of the public service commission did not pretend to, and in fact pretended not to, affect any right or property of the Pacific company. Another answer is that, although said § 99 (Id., § 8626-99) provides that, in all actions between private parties and public service companies involving any order of the commission, or for the enforcement of the orders or rules issued by the commission, the said orders and rules shall be conclusive unless set aside or annulled in a review as in that act provided, nevertheless the commission in said proceedings was acting quasi judicially, and even a court of record which enters a void judgment does not bind the parties thereto, or any one else, and such void judgment may be attacked collaterally.

The case relied upon by appellant as to that point, *State ex rel. Railroad Commission v. Oregon R. & Nav. Co.*, 68 Wash. 160, 123 Pac. 3, only went to the point that the objection, that the complaint does not state sufficient facts to

constitute a cause of action, so as to confer upon the commission jurisdiction of the subject-matter, cannot be raised for the first time in another action brought to enforce an order of the commission, when no such objection was made in the proceeding before the commission and no appeal or review upon such objection was taken as provided by law. It did not go to the point of the lack of power to render any order whatever. It was only intended to be held in the case cited, agreeably to settled and just rules of procedure, that one cannot actively cause or silently permit a court or tribunal to commit an error, or proceed irregularly, in a matter wherein it is assumed that it has jurisdiction and power to proceed, without calling such error to its attention and taking proper steps to review such error or correct such irregularity in the first instance in such court or tribunal; and if not corrected by it, then to review same in the superior court or tribunal, if such right of review exists. It was never intended to hold, in the case cited or in any case called to our attention, that a judgment or order of any court or tribunal of inferior or intermediate powers, where there is an entire lack of power to support such judgment or order, is final and conclusive upon any one. It may be true, also, that the respondent, having failed to obtain a review of the commission's proceedings by the method provided by law, is foreclosed from questioning the validity of and conclusiveness of such finding and order in any other proceedings *except against a cause which renders the order void*.

"If the order is void, even though there was a failure to seek relief against it in the regular way, the party affected is not deprived of the right to defend, when such order is attempted to be enforced in a court of equity." *Southern Indiana R. Co. v. Railroad Commission of Indiana*, 172 Ind. 113, 87 N. E. 966.

In other words, if the order of the commission in controversy was merely erroneous, or an error of judgment only, not having been directly attacked and reviewed as provided

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by §§ 86 and 99 (Id., §§ 8626-86, 8626-99) of the act, it is final and conclusive on all parties. If, however, it rested upon no power or authority, it is void and a nullity.

II. It has been affirmatively established that the state has power, in the exercise of its police power, to regulate common carriers for the benefit of the general public, and to require physical connection of different railroads within the state for the convenient interchange of shipments of freight by transferring cars from one to another, and the state can, by clear express authority, delegate that power to a regulatory commission. *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287; *Jacobson v. Wisconsin M. & P. R. Co.*, 71 Minn. 519, 74 N. W. 893, 70 Am. St. 358, 40 L. R. A. 389; *Grand Trunk R. Co. of Canada v. Michigan R. R. Commission*, 231 U. S. 457.

In the first case above cited, it is said:

"If power were granted by the legislature, and it amounted in the particular case simply to a fair, reasonable, and appropriate regulation of the business of the corporation, when considered with regard to the interests both of the company and of the public, the legislation would be valid, and would furnish, therefore, ample authority for the courts to enforce it."

It will be observed from the above quotation that a test of the authority of the regulating body is that "in the particular case it amounted simply to a fair, reasonable, and appropriate regulation of business." In the present case, the statute conferring the power used the term "and that a necessity exists therefor." Every presumption is in favor of the commission's action where it has such regulatory powers in general, and the burden is upon the complaining party to show that its action was contrary to law. *Jacobson v. Wisconsin, M. & P. R. Co.*, *supra*; *State ex rel. Great Northern R. Co. v. Public Service Commission*, 76 Wash. 625, 137 Pac. 132. Consequently, it is earnestly insisted by the respondent in this case that it was not only its right, but its

duty, to introduce evidence in the trial of this case below to show the unreasonableness and the lack of necessity of the commission's order. The lower court received evidence in behalf of respondent Pacific company.

"Where the taking is under an administrative regulation the defendant must not be denied the right to show that as matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment." *State of Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 524.

As to this situation, appellant's position is that respondent was never denied the right to show that condition, it having been a party to, and participating in, the proceedings before the commission. To this it must be said, first, that ostensibly no order was made by the commission against respondent the Pacific company; and second, the commission has not the power to exercise the right of eminent domain and take or appropriate private property without compensation. It was proper, therefore, to introduce evidence, under the decision of the United States supreme court above cited, for the purpose of showing that the effect of the commission's order would be to deprive the respondent of its property in violation of the fourteenth amendment, and to show that there was no necessity for the order, and that it was arbitrary and unreasonable. Whether the evidence introduced so shows is another question.

The commission found, finding No. 16:

"That a suitable connection between the lines of the Puget Sound Independent Telephone Company and the lines of the Skagit River Telephone Company, for the transfer of messages and conversations can be made at or near the east limits of the city of Sedro-Woolley at a cost of about fifty dollars, without connecting with or using the switchboard of the Pacific Telephone and Telegraph Company, or any other telephone paraphernalia or other property of the Pacific company; that said connection can reasonably be made and an efficient service obtained thereby."

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Aside from the apparent obligation of the connecting and operating contract heretofore mentioned between it and the Pacific company, the Skagit company appears to have no objection to the connection ordered. The Pacific company, however, contends that, because of the connection of its telephone wires at or near the east limits of Sedro-Woolley with the lines of the Skagit company, if the Independent company is permitted to connect its telephone wires with those of the Skagit company at or near the east limits of Sedro-Woolley, the calls made from the Independent company's lines will "ring in" on the lines of the Pacific company, and will interrupt its service, and will, for as long as messages or conversations from the Independent company's lines are going over the lines of the Skagit company, deprive the Pacific company of the use of its connecting lines between Sedro-Woolley and Mount Vernon to the west and to connecting points such as Seattle, and that the efficiency of its service will be greatly impaired. The engineer for the commission himself admitted that "the objection to the connection ordered was that it would cause a loss of supervision and a lack of transmission efficiency."

The lower court was of the opinion that the commission, having, by its 19th finding, found that, by reason of connection between the Pacific company and the Skagit company, one through line of communication exists between points east of Sedro-Woolley and points west of Sedro-Woolley, could not order a connection between the Skagit company and the Independent company the effect of which would be to furnish merely an additional through line of communication, and based his holding largely upon the remarks of the opinion writer and of Judge Chadwick in the case of *Day v. Tacoma R. & Power Co.*, 80 Wash. 161, 141 Pac. 347. It will be observed that, in so far as the transmission of telephonic traffic over the Skagit company's line between Sedro-Woolley and Concrete is concerned, there will be no dual system, but on the contrary a single system of carriage. The appellant

cites the recent case of *Pacific Tel. & Tel. Co. v. Wright-Dickinson Hotel Co.*, 214 Fed. 666, where a direct connection between two different companies having private exchanges in a hotel was ordered by the railroad commission of Oregon, and was sustained by the United States District Court of Oregon, Gilbert, Circuit Judge, and Wolverton, and Bean, District Judges, sitting, wherein Wolverton, District Judge, writing the opinion, used this language:

"It is not a new or different use or burden that is required by the service, nor does another or different person, corporation, or entity occupy or utilize the lines or system of the plaintiff company. It is still left in the full and unrestricted occupancy and operation of its own lines or system, except as it is required to observe and comply with a regulation that the commission has deemed proper to impose upon it, namely, that it transmit also the messages coming from the hotels which originate on the wires of the Home company. This is not a taking of its property in any sense. It is but a reasonable regulation which is properly referable to the police power of the state."

The constitution of Washington, art. 12, § 19, provides as follows:

"Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this state, and said companies shall receive and transmit each other's messages without delay or discrimination, and all of such companies are hereby declared to be common carriers and subject to legislative control. . . . The right of eminent domain is hereby extended to all telegraph and telephone companies. The legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section."

Under a similar constitutional provision of the state of Montana, the Billings Mutual Telephone Company, operating a local telephone system in the city of Billings and having no long distance lines, brought an action against the Rocky Mountain Telephone Company, owning and operating long

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distance lines from Billings to other localities in the state and elsewhere, to appropriate and condemn and have the damages ascertained and paid under the statutes of that state, the right to connect with and use the lines of the Rocky Mountain Telephone Company. The case was brought in the United States District Court for Montana. The court in passing thereon, per Hunt, J., says:

"Where two companies owning different lines of telephones in Montana cannot agree upon the compensation for the privilege of connection and use, the law of Montana obliges the one to submit to connection with the other, and (upon payment of damages to be assessed) to accept a patronage, and to submit to a necessary use that it might not wish to accept or allow, and probably could not be compelled to accept or allow, were it not for the provisions of the constitution and laws of the state. . . . No questions of complicated traffic arrangements enter into consideration of the matter as it now stands before the court. Difficulties of such a nature may arise hereafter, but they can be surmounted when the principle is recognized that the spirit of the constitution and the letter of the laws of the state, in which defendant operates its lines, compel it, under its primal duty to the public, to yield to the right of plaintiff company to connect its line with defendant's and to enjoy the use thereof in a reasonable and effective way, provided, of course, damages are paid as required by law." *Billings Mutual Tel. Co. v. Rocky Mountain Bell Tel. Co.*, 155 Fed. 207; citing *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1; *Campbellsville Tel. Co. v. Lebanon, L. & L. Tel. Co.*, 118 Ky. 277, 80 S. W. 1114, 84 S. W. 518.

The court continuing says:

"From these views it follows that plaintiff is within its rights when it invokes the power of eminent domain for proposed long-distance telephone connections, which constitute a clearly defined public use."

In the instant case, no power of eminent domain is invoked, and no compensation or damages were determined and allowed to respondents. There is, of course, a marked differ-

it further than to say that they were "unable to give assent thereto." From a careful review of most of the decisions, we are satisfied that the decision in the *Eshleman* case is not supported even by the decisions in the Federal jurisdictions, and is against the weight of authority. It is unfortunate further in that, in having decided against the state and in favor of the public service corporation, that decision prevents a review of the Federal questions involved, by the Federal courts. We are satisfied from a careful examination of the authorities that the following are the correct conclusions as to the law:

(1) If without such constitutional and statutory provisions as we have here, while impartial conveyance or transmission of messages by these several companies could be, without physical connection of the lines of the several companies, legally required as a regulation, and physical connection of the lines of the several telephone companies might not be legally required as a mere regulation under the police power, yet "if such connection is voluntarily made by contract, as is here alleged to be the case . . . the act of the parties in making such connection is equivalent to a declaration of a purpose to waive the primary right of independence and imposes upon the property such a public status that it may not be disregarded." *State ex rel. v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; citing *Mahan v. Michigan Tel. Co.*, 132 Mich. 242, 93 N. W. 629; *State of Missouri ex rel. Baltimore & O. R. Co. v. Bell Tel. Co.*, 23 Fed. 539; 37 Cyc. 1656-1658.

(2) That when one telephone company has opened its lines to physical connection and services for another telephone company upon certain terms, it can be required, as a state regulation within the police power, to accord the same facilities, conveniences, and uses to another or other telephone companies upon equal terms. It is not open to the Skagit company to allege that the Independent company is a competitive company, for as to it the Independent company is only a connecting or extending company. It is not open to

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the Pacific company to object on the ground that the Independent company is a competitor, for the connection between the Independent and the Skagit companies is not a connection between competing lines. Furthermore, the Pacific company itself, having no right under its contract to a monopolistic use of the Skagit company's line, has no other or different right than the Independent company has to connect with the Skagit company's line.

(3) Our conclusion further is that the commission has power to order such physical connection as it has ordered in this case under our constitution and statutes, but that it must make such orders as will not discriminate, or favor one company or concern above another. It found in this case that the cost of connection would be \$50. However that may be, before its order will be valid it must provide for the payment to the Skagit company of the cost of making the connection, by either the petitioners or the Independent company. It must further provide for such reasonable regulation as will prevent interference between the Independent company and the Pacific company when using the lines of the Skagit company. It must further provide for such reasonable joint rates or tolls as shall be appropriate between the lines of the Pacific company and of the Independent company in conjunction with the Skagit company, for the use of the Skagit company's lines. When such provisions are made, the order of the commission will comply with the letter and spirit of the constitution and of the statute relating to such regulation.

We are not concerned with the reasons given by the learned trial court for its judgment; the order of the commission as it stands is invalid for the reasons stated in our third conclusion herein, and the judgment of the lower court dismissing appellants' action to enforce said order is right. It is therefore affirmed.

MOUNT, MAIN, ELLIS, FULLERTON, CROW, and PARKER, JJ., concur.

sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis, 'my license is to establish a telephonic system open to the doctors and the merchants but shutting out you gentlemen of the bar.' The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company, tendering equal pay for equal service."

It was said also in *Delaware & A. Tel. & Tel. Co. v. State of Delaware ex rel. Postal Telegraph-Cable Co.*, 50 Fed. 677: "They cannot discriminate between individuals or classes which they undertake to serve." In *State ex rel. Postal Telegraph-Cable Co. v. Delaware & A. Tel. & Tel. Co.*, 47 Fed. 688, it was held:

"Respondent [a telephone company] was a common carrier, offering to the public the use of its telephonic system for the rapid conveyance of oral messages, and as such, was subject to the duty of serving all persons alike, impartially, and without unreasonable discrimination; and that the right to equal facilities for the use of such public system extended to telegraph companies as well as to individuals."

III. While the Skagit company seems in this controversy in a measure passive and the Pacific company actively opposed to the enforcement of the commission's order, the Skagit company is in reality the center of attack. It is to render the localities served by it accessible also to the users of the Independent company, the same as they are accessible to the users of the Pacific company, that the proceedings were had and the order made. The contract between the Pacific company and the Skagit company has been determined void as in violation of the act of Congress of July 3, 1890, entitled: "An act to protect trade and commerce against unlawful restraints and monopolies," in a case decided by the United States District Court for the District of Oregon and entered therein on March 26, 1914, wherein, by consent of

the Pacific company, which was one of the parties therein in a suit by the United States as complainant against it and many other telephone companies, it was adjudicated:

"Twelfth. That the Pacific Company has made many contracts with other telephone companies doing business in and between Washington, Oregon and Idaho, whereby said other companies agree to give to said Pacific Company exclusively all long distance business originating on their lines. Wherefore, the Pacific Company, its officers, directors, agents, and employees, are perpetually restrained and enjoined from enforcing or attempting to enforce or accepting any benefits under the exclusive provisions in said contracts and from entering into any like covenants in the future."

The lines of the Pacific company and of the Skagit company are, however, physically connected at Sedro-Woolley by virtue of said contract as previously made and with mutual benefits, but the exclusive privileges of each of said companies over the lines of the other are ended. The users of the Independent company's lines are not directly connected with the localities and users of the Skagit company's lines, and there are, therefore, localities on the Skagit company's lines "not reached by the lines of the Independent company alone." But by connecting the lines of the Independent company with those of the Skagit company at or near the easterly limits of Sedro-Woolley, they could be reached by the users of the Independent company. This the statute, if it is valid, expressly authorizes.

The respondents rely very largely upon the decision by the supreme court of California in *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119. The court in that case ignored the express and mandatory provision of the constitution of the state of California, and rested its decision almost, if not entirely, upon the provisions particularly of the fourteenth amendment to the Federal constitution. In the case of *Pacific Tel. & Tel. Co. v. Wright-Dickinson Hotel Co.*, *supra*, the three judges sitting in the district court of Oregon declined to follow that case, without commenting on

it further than to say that they were "unable to give assent thereto." From a careful review of most of the decisions, we are satisfied that the decision in the *Eshleman* case is not supported even by the decisions in the Federal jurisdictions, and is against the weight of authority. It is unfortunate further in that, in having decided against the state and in favor of the public service corporation, that decision prevents a review of the Federal questions involved, by the Federal courts. We are satisfied from a careful examination of the authorities that the following are the correct conclusions as to the law:

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We are not concerned with the reasons given by the learned trial court for its judgment; the order of the commission as it stands is invalid for the reasons stated in our third conclusion herein, and the judgment of the lower court dismissing appellants' action to enforce said order is right. It is therefore affirmed.

MOUNT, MAIN, ELLIS, FULLERTON, CROW, and PARKER,
JJ., concur.

[No. 12272. Department One. April 12, 1915.]

GEORGE L. HOUGHTON, *Appellant*, v. JOHN E. HUMPHRIES,
Respondent.¹

LIBEL AND SLANDER—PRIVILEGE—JUDGES. A judge of a court is absolutely exempt from liability in damages for words of a slanderous nature spoken by him of one of the attorneys in the course of a judicial proceeding over which he was presiding.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered May 4, 1914, upon sustaining a demurrer to the complaint, dismissing an action for slander. Affirmed.

George L. Houghton, for appellant.

Edward Judd, for respondent.

PARKER, J.—The plaintiff, George L. Houghton, seeks recovery of damages which he alleges resulted to him from slanderous and defamatory words spoken of him by the defendant, John E. Humphries, a judge of the superior court for King county. The defendant demurred to the plaintiff's complaint upon the ground, among others, that it does not state facts constituting a cause of action. This demurrer was sustained by the trial court, and the plaintiff electing to stand upon his complaint and not plead further, judgment of dismissal was rendered against him. From this disposition of the cause, the plaintiff has appealed.

It appears from the allegations of the complaint that the words upon which appellant rests his right of recovery were spoken by respondent in the course of a judicial proceeding in a department of the superior court for King county while he was presiding therein as judge. We are inclined to the view that the words complained of are not actionable in any event, and also that the allegations of the complaint fail to negative their relevancy to the proceeding during the course

¹Reported in 147 Pac. 641.

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of which they were spoken. However, whatever our conclusion might be upon a critical examination of these questions, we are clearly of the opinion that respondent by reason of his official position as judge, is absolutely exempt from liability for damages at the suit of any person claiming to be injured by such words. This court has recognized the general rule that when exemption from liability for the use of slanderous words is sought to be invoked by a private person or an attorney in the course of a judicial proceeding, such exemption is qualified, in that the words must be relevant to the proceeding in which they are spoken, in order to exempt the one using them from liability to damages flowing from their slanderous effect. *Abbott v. National Bank of Commerce*, 20 Wash. 552, 56 Pac. 376; *Müller v. Gust*, 71 Wash. 139, 127 Pac. 845. But it does not follow that such qualification in the least curtails the absolute character of the exemption accorded to judges of courts of general jurisdiction, jurors, legislators and, possibly, other public servants, as to words written or spoken by them in the course of their official duties. In *Yates v. Lansing*, 5 Johns. 282, 291, Chief Justice Kent, speaking for the New York Supreme Court of Judicature, in 1810, relative to the exemption of judges, at page 291, said:

“We meet with the principle here stated as early as the *Book of Assise*, 27 Ed. III. pl. 18. The case there was, that A. was indicted, for that, being a judge of *oyer et terminer*. certain persons were indicted before him of trespass, and he had entered upon the record that they were indicted of felony, and judgment was demanded, if he should answer for falsifying the record, since he was a judge by commission; and all the judges were of opinion that the presentment was void.”

In *Dunham v. Powers*, 42 Vt. 1, there was involved a charge of slander against a juror for words spoken in the jury room by him of the plaintiff. In holding the juror absolutely exempt from liability therefor, Judge Prout, speaking for the court at p. 8, said:

"As to members of a legislative body, the rule as held in all the cases is, that in the performance of their official duties they are absolutely protected. No action of slander will lie against them, however false and malicious may be the charge they make against the reputation of another, if made in the exercise of the functions of their office, or within the line of their business or duty; and so of grand jurors and magistrates, charging others with the commission of crime. Of judges and jurors, it is said in *Sutton v. Johnstone*, 1 Term, 493, although a point not decided, that 'the law gives faith and credence to what they do, and therefore there must always in and what they do be cause for it, and there never can be malice in what they do.' To subject either to a prosecution for slander for what they may say in the course of the proceeding, as it is expressed, would affect their independence and degrade the administration of the law. Counsellors and parties conducting their own cases are privileged, when they confine 'themselves to what was pertinent to the question before the court.' *Hastings v. Lusk*, 22 Wend. 409; *Mower v. Watson*, 11 Vt. 536. In the last case cited it is remarked that 'the privilege of all whose duty or interest calls them to participate in the proceedings of courts of justice, is not to be made liable to an action of slander or libel for anything spoken or written therein, provided it be in the ordinary course of proceeding, or *bona fide*.' But there is a distinction, we think, as to the extent of the privilege growing out of the legal duty of a juror to act in that capacity and the duty of counsel arising from his employment and consequent interest, which induces him to participate in the proceeding. The former acts in obedience to the requirement of law and on oath; the other from motives of interest and pecuniary gain. One is a part or branch of the court, and within the absolute rule of impunity, while the other is only *prima facie* privileged for what he may say in the course of the proceeding, and in which he participates.

"In *O'Donaghue v. M'Govern*, 23 Wend. 26, Cowen, J. observes: 'Sometimes the person complained of is absolutely protected. This would be so where the libel was published by him in the course of his business or duty as a member of the legislature. The place protects him. So of judges, jurors and witnesses,' while and when they are acting in the line of their business or duty. These principles we think not only

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in entire harmony with the law, but fitting and necessary, that jurors may discharge their duties without fear or apprehension of a prosecution at the suit of parties feeling aggrieved by their verdict. *Coffin v. Coffin*, 4 Mass. 1; *Harris v. Huntington*, 2 Tyler 129; *Henderson v. Broomhead*, 4 Hurl. & Nor. 567; *Thomas v. Churton*, 110 E. C. L. 475; Townshend on Slander and Libel, § 227 and note 1113."

In *Rice v. Coolidge*, 121 Mass. 393, 395, 23 Am. Rep. 279, Justice Morton said:

"It seems to be settled by the English authorities that judges, counsel, parties and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings. *Henderson v. Broomhead*, 4 H. & N. 569; *Revis v. Smith*, 18 C. B. 126; *Dawkins v. Rokeby*, L. R. 8. Q. B. 255, and cases cited; affirmed, L. R. 7 H. L. 744; *Seaman v. Netherclift*, 1 C. P. D. 540. The same doctrine is generally held in the American courts, with the qualification, as to parties, counsel and witnesses, that, in order to be privileged, their statements made in the course of an action must be pertinent and material to the case. *White v. Carroll*, 42 N. Y. 161; *Smith v. Howard*, 28 Ia. 51; *Barnes v. McCrate*, 32 Me. 442; *Kidder v. Parkhurst*, 3 Allen 393; *Hoar v. Wood*, 3 Met. 193."

In *Spalding v. Vilas*, 161 U. S. 483, 494, Justice Harlan, speaking for the court, said:

"The same principle was announced in England in the case of *Fray v. Blackburn*, 3 B. & S. 576, in which Mr. Justice Crompton said: 'It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore, the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit and was established in order to secure the independence of the judges and prevent them from being harassed by vexatious actions.' The principle was applied in one case for the protection of a county court judge, who was sued for slander, the words complained of having been spoken by him in his capacity as judge, while sitting in court, engaged in the trial of a cause in which the plaintiff was defendant. Chief Baron

Kelly observed that a series of decisions, uniformly to the same effect, extending from the time of Lord Coke to the present time, established the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice, and that the doctrine had been applied to the court of a coroner, and to a court-martial, as well as to the superior courts. He said: 'It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him?' *Scott v. Stansfield*, L. R. 8 Ex. 220, 223."

These observations render plain the necessity of the rule of public policy which prevents inquiry into the question of relevancy of the words spoken to the public matter in hand. The exemption is absolute if they are spoken in the performance of an official act. No decision has come to our notice out of harmony with this view. A judge, for any such wrong, is answerable only to the public, through such process of law, impeachment or otherwise, as may be provided.

The judgment is affirmed.

MORRIS, C. J., HOLCOMB, MOUNT, and CHADWICK, JJ.,
concur.

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[No. 12297. Department One. April 12, 1915.]

UNIVERSITY STATE BANK, *Respondent*, v. H. W. STEEVES,
Appellant.¹

CHattel MORTGAGES—RECORD—NOTICE. A chattel mortgage of record in the proper registration office, and unsatisfied of record, is constructive notice to those subsequently becoming interested in the property, that the debt secured thereby has not been wholly paid.

SUBROGATION—RIGHT OF MORTGAGOR—PAYING DEBT AFTER SALE OF PROPERTY. Where a mortgagor of personalty, having transferred the property subject to the mortgage, was subsequently compelled to pay the mortgage indebtedness, and took an assignment of the note and mortgage, the debt was not thereby discharged, but he was entitled to be subrogated to all the rights of the mortgagee and he or his assignees could enforce foreclosure.

SUBROGATION—EXTENT OF DOCTRINE. The right of subrogation is not limited to sureties and quasi sureties, but is freely applied by courts of equity in all cases where good conscience and equity dictate that a debt paid by one under any sort of legal coercion ought to be paid by another.

Appeal from a judgment of the superior court for King county, Smith, J., entered February 10, 1914, upon findings in favor of the plaintiff, in an action to foreclose a chattel mortgage, tried to the court. Affirmed.

Aust & Terhune and *Miller & Lysons*, for appellant.

Jno. Mills Day, for respondent.

PARKER, J.—The plaintiff, University State Bank, commenced this action in the superior court for King county against the defendants Joseph Ellison, H. W. Steeves, and others, seeking foreclosure of a chattel mortgage executed by Ellison upon the personal property of a laundry plant in Seattle. The mortgage and the note it was given to secure became the property of the plaintiff through mesne assignments. The title to the mortgaged property passed to the defendant Steeves through mesne conveyances. Decree of

¹Reported in 147 Pac. 645.

it further than to say that they were "unable to give assent thereto." From a careful review of most of the decisions, we are satisfied that the decision in the *Eshleman* case is not supported even by the decisions in the Federal jurisdictions, and is against the weight of authority. It is unfortunate further in that, in having decided against the state and in favor of the public service corporation, that decision prevents a review of the Federal questions involved, by the Federal courts. We are satisfied from a careful examination of the authorities that the following are the correct conclusions as to the law:

(1) If without such constitutional and statutory provisions as we have here, while impartial conveyance or transmission of messages by these several companies could be, without physical connection of the lines of the several companies, legally required as a regulation, and physical connection of the lines of the several telephone companies might not be legally required as a mere regulation under the police power, yet "if such connection is voluntarily made by contract, as is here alleged to be the case . . . the act of the parties in making such connection is equivalent to a declaration of a purpose to waive the primary right of independence and imposes upon the property such a public status that it may not be disregarded." *State ex rel. v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; citing *Mahan v. Michigan Tel. Co.*, 132 Mich. 242, 93 N. W. 629; *State of Missouri ex rel. Baltimore & O. R. Co. v. Bell Tel. Co.*, 23 Fed. 539; 37 Cyc. 1656-1658.

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(3) Our conclusion further is that the commission has power to order such physical connection as it has ordered in this case under our constitution and statutes, but that it must make such orders as will not discriminate, or favor one company or concern above another. It found in this case that the cost of connection would be \$50. However that may be, before its order will be valid it must provide for the payment to the Skagit company of the cost of making the connection, by either the petitioners or the Independent company. It must further provide for such reasonable regulation as will prevent interference between the Independent company and the Pacific company when using the lines of the Skagit company. It must further provide for such reasonable joint rates or tolls as shall be appropriate between the lines of the Pacific company and of the Independent company in conjunction with the Skagit company, for the use of the Skagit company's lines. When such provisions are made, the order of the commission will comply with the letter and spirit of the constitution and of the statute relating to such regulation.

We are not concerned with the reasons given by the learned trial court for its judgment; the order of the commission as it stands is invalid for the reasons stated in our third conclusion herein, and the judgment of the lower court dismissing appellants' action to enforce said order is right. It is therefore affirmed.

MOUNT, MAIN, ELLIS, FULLERTON, CROW, and PARKER,
JJ., concur.

been wholly paid. We are inclined to accept the trial court's finding as to this fact, but in any event, there was at all times since the conveyance to Ellison's Hand Laundry this balance due upon the mortgage, and the mortgage was of record in the auditor's office and unsatisfied of record. This of itself is, in any event, sufficient to bind those who became interested in the property subsequent to the execution and recording of the mortgage.

Respondent rested its right of foreclosure upon the theory that, by virtue of Ellison's Hand Laundry accepting conveyance of the property from Ellison subject to the mortgage, Chin Loy's accepting conveyance of the property from Ellison's Hand Laundry subject to the mortgage and his agreeing at the same time to assume and pay the balance due thereon, and the taking of an assignment of the mortgage by Ellison with the surrender to him of the note from the Northwest Trust and Safe Deposit Company, Ellison, and in turn respondent, University State Bank, by subrogation became possessed of all rights of the Northwest Trust and Safe Deposit Company, so far as such rights might be enforced against the property by foreclosure of the mortgage to pay the balance due upon the debt secured thereby. This, apparently, was also the theory upon which the trial court rendered its decree of foreclosure in favor of respondent.

Appellant contends that the transfer of the note and mortgage by the Northwest Trust and Safe Deposit Company to Ellison upon its receiving from him the balance due thereon, was, in effect, a complete extinguishing of the debt evidenced by the note and secured by the mortgage, because of the fact that Ellison, as between himself and the Northwest Trust and Safe Deposit Company, was the principal debtor. This is a plausible theory, viewed superficially. It does not follow, however, that Ellison would be the principal debtor as between himself and some other person, fund or property liable for the debt, which person, fund or property Ellison might be entitled to have treated as the principal debtor so as to secure

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for himself such subrogation rights as sureties are entitled to exercise.

We shall not rest our conclusion upon the fact that Chin Loy expressly assumed and agreed to pay the balance due upon the mortgage debt, since that assumption of the mortgage debt was not an agreement to which Ellison was a party. We shall proceed upon the assumption that Ellison's right of subrogation must rest upon the agreement to which he was a party, to wit, his conveyance to Ellison's Hand Laundry, whereby it took the title subject to the mortgage. If we should proceed upon the assumption that Ellison's grantee had agreed with him to assume and pay the balance due upon the mortgage debt as well as merely receiving the title subject to the mortgage, our problem might possibly be somewhat simpler and easier of solution. For then the answer would be found in the doctrine that:

"A mortgagor who, after selling the land to one who assumes and agrees to pay the mortgage debt, is compelled to pay the debt himself, is entitled to be subrogated to the rights of the mortgagee and may foreclose the mortgage for his own benefit, for the vendor becomes in effect the surety and the vendee the principal." 37 Cyc. 465.

This doctrine finds support in many decisions, among others that of *Orrick v. Durham*, 79 Mo. 174, where we find the following:

"Leaving then for the moment Durham out of view, had Orrick, who was primarily personally bound to Shaw for the \$333.33 debt, paid the same off, either voluntarily or under compulsion, would he not, upon clear principles of equity, have been entitled to be subrogated to the rights of the mortgagee, Shaw? Does it make any difference, as suggested by respondent's counsel, that Orrick paid his own debt to Shaw? There is neither anomaly nor solecism in a mortgagor under certain circumstances, who pays his own mortgage debt, becoming subrogated to the rights of the mortgagee as against a subsequent incumbrance or purchase. In *Halsey v. Reed*, 9 Paige 446, 453, it was held in a case involving the principle under consideration, that if the mortgagor 'had paid the

amount of the bond and mortgage voluntarily to the present holders thereof, he would have had a right to demand an assignment of the same, to enable him to enforce payment out of the promises.' In *Stillman v. Stillman*, 21 N. J. Eq. 127, 129, it is expressly held that one may purchase his own mortgage on land that he has sold and although such purchase may render the bond unavailing, yet where lands are conveyed, as these were subject to the mortgage as part of the consideration, the mortgage is the principal security, and even if the mortgagor pays the bond, he is entitled to be subrogated as to the mortgagee, and to be repaid out of the land what he has paid on his own bond. *Kamena v. Huelbig*, 23 N. J. Eq. 78, is a clear enunciation of the same equitable principle. In short, this is now a well recognized feature of equity jurisprudence. Sheldon on Subrogation, §§ 24, 26; *Moore's Appeal*, 88 Pa. St. 450; 51 N. Y. 333.

"Another view of this question is pertinent. If a party owning land incumbered by mortgage for his debt, sells it to another, who, as a part of the purchase money, agrees to pay this mortgage debt, as between themselves the vendor becomes the security of the vendee for the mortgage debt. Brandt on Sur. and Guar., § 24. And in such case he is entitled, on payment of the debt, to be subrogated to the rights of the mortgagee and may to that end compel the assignment of the mortgage to him. This rests upon the principle that in equity the land becomes the primary fund for the payment of the debt. *Johnson v. Zink*, 51 N. Y. 333; 1 Story Eq., § 499."

Now since respondent is not seeking to hold appellant Steeves or any of his predecessors in interest under the mortgage personally liable, but is seeking merely to subject the mortgaged property, as being primarily liable, to the satisfaction of the balance due upon the mortgage debt, it seems to us that this doctrine is by analogy applicable here in support of respondent's claim of its right to have this mortgaged property so subjected to the payment of the balance due upon the mortgage debt. It seems to us that the doctrine is equally applicable whether the new principal debtor be an individual or whether some particular property or fund becomes primarily liable for the payment of the debt and in that sense

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becomes the new principal debtor as between it and the original principal debtor. Nor are we without authorities lending support to this view.

In *Johnson v. Zink*, 51 N. Y. 338, there was involved a situation much like this, so far as the application of this doctrine thereto is concerned. In that case the conveyance was made "subject to the mortgage," though apparently it affirmatively appeared from other evidence that the mortgage debt was regarded as a part of the consideration of the purchase price. The grantor, being personally liable for the mortgage debt, took up the note and mortgage and sued to foreclose the same, claiming his right so to do by virtue of the doctrine of subrogation. Disposing of this branch of the case, the court said:

"The conveyance by the mortgagor of the mortgaged premises, 'subject to' the mortgage in question, to Comstock conveyed to him the equity of redemption only, and consequently the mortgage was to be discharged and satisfied out of those premises, before any right or interest therein was acquired by the grantee, and as between those parties it is clearly equitable that such discharge and satisfaction should be made out of the said premises, and that the obligor and mortgagor should not, in exoneration thereof, personally be called upon to pay the same out of his individual property. The effect of the transaction was in equity to make the land the primary fund for the payment of the debt, and to place the plaintiff in the situation or relation of surety therefor only. This principle is clearly established. (See *Jumel v. Jumel*, 7 Paige 591-594; *Halsey v. Reed*, 9 id. 446-453 etc.; *Marsh v. Pike*, 10 id. 595; *Cherry v. Monroe*, 2 Barb. Ch. 618; *Ferris v. Crawford*, 2 Denio, 595; *Stebbins v. Hall*, 29 Barb. 524, 529, 538.)

"This relation between the mortgagor and his grantee does not deprive the obligee from enforcing the bond against the obligor. He is entitled to his debt, and has a right to avail himself of all his securities. Equity, however, requires that the obligor, on the payment of the debt out of his own funds, should be subrogated to the rights of the obligee, so that he can reimburse himself by a recourse to the mortgaged

premises for that purpose. This cannot prejudice the creditor, and it is clearly equitable as between the debtor and the owner of the land. He clearly has no right or color of right, justice or equity to claim that he, notwithstanding the conveyance of the property subject to the mortgage, and thus entitling him only to its value over and above it, should in fact enjoy and hold it discharged of the encumbrance, without any contribution toward its discharge and satisfaction, from the land. This equitable principle is fully recognized in most of the cases above cited. Indeed, it is so consistent with right and justice as to require no authorities to sustain it."

This view finds support in *Woodbury v. Swan*, 58 N. H. 380, and *Gregory v. Arms*, 48 Ind. App. 562. In the last cited case it is said:

"Where a person takes a deed to real estate subject to encumbrances thereon, he does not thereby become personally liable to discharge the preexisting liens, but, in the absence of any showing to the contrary, the purchaser is deemed to have deducted the amount of the prior encumbrances from the purchase price, and the land in his hands becomes the primary source of funds out of which the encumbrances are to be paid."

These remarks, and the authorities cited in connection therewith, are of interest here touching the question of the consideration for the exception from the covenants of warranty and agreement to defend the title. In this connection some contention is sought to be made touching the sufficiency of this consideration, which also seems to be an attack upon the conveyance from Ellison to Ellison's Hand Laundry, upon the theory that the par value of the stock given by Ellison's Hand Laundry, the corporation, to Ellison for the laundry exceeded the value of the property. This is a problem that might be of some interest were we dealing with the rights of creditors of Ellison's Hand Laundry in a bankruptcy or insolvency proceeding. It is, however, a matter wholly foreign to our present inquiry. Appellant has no right to complain of that conveyance. It manifestly was good as between Ellison and Ellison's Hand Laundry, the corporation, and rests

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upon a sufficient consideration so far as the rights of appellant are concerned, and it plainly, we think, evidences an intent on the part of Ellison and Ellison's Hand Laundry that as between them Ellison should not be required to pay the mortgage debt, but that the property should answer therefor.

The doctrine of subrogation is not so restricted in its application as formerly. In *Murray v. O'Brien*, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998, we said:

"The remedy is no longer limited to sureties and quasi sureties, but is freely applied by courts of equity in all cases where good conscience and equity dictate that a debt paid by one under any sort of legal coercion ought to be paid by another. *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1; *Parsons v. Urie*, 10 Am. & Eng. Ann. Cases 280 (104 Md. 238, 64 Atl. 927, 8 L. R. A. (N. S.) 559); *Pomeroy*, Equity Jurisp., §§ 798, 799; *In re Bruce*, 158 Fed. 123; *Beach*, Modern Equity, Jurisp., 802-804; *Twombly v. Cassidy*, 82 N. Y. 155; *Kinkead v. Ryan*, 65 N. J. Eq. 726, 55 Atl. 730."

Our more recent decision in *Pease v. Syler*, 78 Wash. 24, 138 Pac. 310, lends support to these views.

We conclude that the trial court properly disposed of the cause, and its judgment is therefore affirmed.

MORRIS, C. J., HOLCOMB, MOUNT, and CHADWICK, JJ.,
concur.

[No. 12454. Department One. April 12, 1915.]

E. T. HARRIS, *Respondent*, v. THE CITY OF BREMERTON,
Appellant.¹

MUNICIPAL CORPORATIONS—CITY WHARF—PERSONAL INJURY—QUESTION FOR JURY—NEGLIGENCE. Whether a city was negligent in maintaining a wharf made up of two floats placed end to end, about one and one-half feet apart, with an apron or platform connecting the two floats, leaving an open space, which in the nighttime was not readily observable by reason of the shadow of a pile thrown upon it, presents a question for the jury, where a ferryman, who had never before been upon the wharf, but knew the general manner of its construction, fell into the open space thus cast in shadow.

SAME—CONTRIBUTORY NEGLIGENCE—FORGETFULNESS OF HIDDEN DANGER. The fact that the person injured had knowledge of the manner of construction of the wharf would not as a matter of law constitute contributory negligence, when the danger was so hidden as not of itself to be a reminder of its existence to one coming within its presence.

SAME—WHO ARE TRESPASSERS. The fact that a ferryman operating a launch for hire had not paid the wharfage license required by the city would not render him a trespasser in the use of a wharf at which he landed, to the extent of depriving him of the right of protection against personal injuries received through the city's negligence in maintaining the wharf in a dangerous condition.

APPEAL AND ERROR—PRESERVATION OF GROUNDS—NECESSITY OF EXCEPTIONS. Alleged error in the giving of instructions will not be reviewed on appeal where exceptions to such instructions are not presented by the statement of facts or bill of exceptions.

SAME—PRESERVATION OF GROUNDS—EXCEPTIONS—INSTRUCTIONS. Errors assigned in the giving of instructions will not be considered on appeal where the purported exceptions refer to instructions by number only, and there are no numbered instructions in the record.

APPEAL—HARMLESS ERROR—REQUESTED INSTRUCTIONS. Refusal to give requested instructions is not prejudicial error when they were given in substance in other instructions, in so far as the facts of the case call for instructions upon the matters requested.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered June 20, 1914, upon the verdict

¹Reported in 147 Pac. 638.

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of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Jas. W. Carr, for appellant.

Vince H. Faben and *C. D. Sutton*, for respondent.

PARKER, J.—The plaintiff, E. T. Harris, commenced this action in the superior court for Kitsap county, seeking recovery of damages which he alleged resulted to him from the negligence of the defendant city in the maintenance of a floating public wharf used for the landing of launches and other small water craft. Trial before the court and a jury resulted in a verdict and judgment against the city, from which it has appealed to this court.

The city maintains a floating wharf for the use of the public at which small water craft land to receive and discharge passengers. The wharf consists of two floats, each being sixteen feet wide and approximately forty feet long. They lie end to end and project from the shore into deep water. They are held in place by piles so as to permit their rising and falling with the tide. Between the two floats there is a space of about eighteen inches. In this space there are two piles, each near the outer edges of the floats. The floats are held in place by these piles and two chains, fastening the floats together near their outer edges just outside the piles. There was at the time here involved an apron about five feet wide covering a portion of this open space between the floats and the piles, so that on each side between the apron and the piles there was an open space of water of about one and one-half by four feet. These spaces were not protected by railing or otherwise. There was an electric light some twenty-five feet distant from the wharf at right angles thereto, opposite this open space and the piles, so situated that it threw the shadow of one of the piles over the open spaces between the floats, rendering them not readily discernible at night to one passing over the wharf. The

wharf was evidently contemplated to be used by the public in the night as well as in the day, and the light was evidently for the purpose of lighting this wharf as well as another municipal wharf on and near the edge of which it was placed. The maintenance of the floating wharf in this manner, rendering the open space dangerous at night, is the alleged negligence of the city complained of.

At the time respondent was injured, he was operating a launch for hire, being engaged in ferrying passengers between Port Orchard and Bremerton and other points in that neighborhood. He had landed his launch at the wharf to receive and discharge passengers some five or six times only, the wharf being open to the public only a short time. He had never actually been upon the wharf, though he knew in a general way of the manner of its construction and of the open spaces and apron between the two floats of the wharf. On the night of April 5, 1913, about ten-thirty o'clock, he landed at the wharf with his launch. He stepped from the launch upon the wharf and, evidently with the view of reaching the bow of his launch and tying it to the wharf, walked along the wharf and fell into one of the open spaces between the floats, breaking one of his legs and receiving other severe injuries of which he now complains. He apparently momentarily forgot the open space between the floats, and, it then being in the shadow of the pile, he did not see it and was not reminded of it. There is some evidence tending to show that the city knew of the danger of these open spaces in the shadow of the pile at night, and, also, that it knew of other persons having been injured by falling into them.

Some contention is made that the evidence was not sufficient to support the conclusion that the city was negligent in the maintenance of the wharf with the open space therein. We think this contention cannot be sustained as a matter of law, in view of the hidden danger which existed because of the open spaces, and their not being readily observable at night by reason of the shadow of the pile being thrown upon

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them, and the fact that people would necessarily have to walk so close to them in passing along the wharf. These facts, we think, made the question of the city's negligence one for the jury to determine. *Gregg v. King County*, 80 Wash. 196, 141 Pac. 340.

It is also contended that respondent was guilty of contributory negligence, in the light of his knowledge of the manner of the construction of the wharf. We are unable to so decide as a matter of law. If the open space had been so apparent at the time that one could have readily seen it and thus been reminded of the danger, there would possibly be merit to this contention, but momentary forgetfulness may absolve one from the charge of contributory negligence when the danger is so hidden as not of itself to be a reminder of its existence to one coming within its presence. We have repeatedly held that mere forgetfulness of hidden danger with which one may be acquainted does not necessarily, as a matter of law, constitute contributory negligence. *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114; *Williams v. Ballard Lumber Co.*, 41 Wash. 338, 83 Pac. 323; *Blankenship v. King County*, 68 Wash. 84, 122 Pac. 616, 40 L. R. A. (N. S.) 182.

It is contended that the trial court erred in rulings made upon the pleadings and in excluding evidence which in effect eliminated from the case the question of respondent's being a trespasser upon the wharf at the time he was injured, which question counsel for the city sought to bring into the case with the view of defeating respondent's right of recovery. The fact thus sought to be proven was, in substance, that the city required all persons operating launches or boats for hire to pay wharfage for the privilege of landing at the wharf, and that respondent had failed to make such payment and therefore had no right to land his launch there. The law which regards the maintenance of a wharf for the use of the public as an invitation to all persons to go upon it who may have use for it is stated in 40 Cyc. 917, as follows:

"The keeping of a pier, built into or adjacent to navigable waters for the purpose of loading and unloading vessels, gives a general license to all persons to go upon and use it in the manner and for the purposes contemplated; and so long as it is kept open, the duty rests upon the occupant or owner of keeping it in a safe condition so that those having a lawful right can go upon it without incurring risk of injury. Consequently if a person, when properly on the wharf, in the exercise of reasonable care and diligence, sustains injury through a defect in the wharf, he is entitled to recover, unless the defect was so hidden and concealed that it could not be discovered by such examination and inspection as the construction, uses, and exposures of the wharf reasonably required. Plaintiff's right of action in such a case arises from the duty which the law imposes on the owner or occupant to keep the wharf safe, so long as he should permit it to be open and used, and not from any contract between them."

In view of the public use to which the wharf was admittedly intended by the city, and the implied invitation to the public to go upon it and use it, we think that the mere fact that the respondent had not paid the wharfage did not render him a trespasser to the extent that thereby he lost such right of protection against personal injuries received through the city's negligence when he was upon the wharf as other members of the public had. It may be that the city could have prevented him from landing his launch at the wharf without first paying the wharfage, but the city did not do so. We think that whatever failure there may have been on the part of the respondent to pay for this privilege, it did not affect his rights sought to be enforced in this action. *City of Petersburg v. Applegrath's Adm'r*, 28 Gratt. 321, 26 Am. Rep. 357; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Lowe v. Salt Lake City*, 13 Utah 91, 44 Pac. 1050, 57 Am. St. 708.

Counsel for the city contends that the trial court erred in giving instructions to the jury. We do not find in the statement of facts any exception to the instructions complained of. Under our decisions in *Coffey v. Seattle Elec. Co.*, 59

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Wash. 686, 109 Pac. 202, and *State v. Peebles*, 71 Wash. 451, 129 Pac. 108, this would seem to preclude inquiry upon our part touching such claimed errors, since under those decisions there seems to be no way of proper preservation of such question for our review except by bill of exceptions or statement of facts. We find among the clerk's files certified here a paper purporting to be the city's exceptions to the instructions complained of, and by indorsement of the trial judge thereon these exceptions appear to have been allowed by him before the return of the jury to render their verdict. It could be well argued that this is not a bill of exceptions binding upon the respondent properly preserving these questions for review here, in the light of Rem. & Bal. Code, §§ 389, 391 (P. C. 81 §§ 685, 689), prescribing the notice, time and manner of certifying a bill of exceptions or statement of facts. However this may be, these purported exceptions refer to supposed instructions by number only, and there are no numbered instructions in the record before us given by the court. It seems, therefore, quite clear to us that these claimed errors in the giving of instructions do not refer to instructions sought to be reviewed, with such certainty as to enable us to notice them, aside from the question of the exceptions not being otherwise properly preserved by bill of exceptions or statement of facts in the record. The exceptions do not tell us what instructions were called to the trial court's attention and claimed to be erroneous.

By this same method of identification, appellant's counsel had, in the same paper only, attempted to except to the refusal of the court to give certain instructions requested by him to be given. Of these claimed errors we think it is sufficient to say that we have carefully read all these requested instructions and are clearly of the opinion that they were given in substance in so far as the facts of the case call for instructions upon matters therein requested. In connection with these claimed errors, we also pass the question of the proper preservation of exceptions to the refusal of the court

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to give these instructions, because of the failure to have such exceptions included in a bill of exceptions or the statement of facts.

Contention is made that the verdict of the jury is excessive to the extent that it evidences prejudice and passion on the part of the jury. We deem it sufficient to say that careful review of the evidence convinces us that the verdict of the jury should not be disturbed upon this ground.

The judgment is affirmed.

MORRIS, C. J., HOLCOMB, MOUNT, and CHADWICK, JJ.,
concur.

[No. 12465. Department One. April 12, 1915.]

S. L. CALDWELL, *Respondent*, v. SCHOOL DISTRICT No. 301,
COUNTY OF SNOHOMISH, *Appellant*.¹

SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—RIGHT TO COMPENSATION. Where one employed as superintendent of schools was not entitled to the office because there was no vacancy, but at the same time entered into a regular teacher's contract with the majority of the board to teach in the schools of the district, he is entitled to the contract price for services actually performed by him under the contract as a teacher.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered May 15, 1914, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Cooley & Horan and R. Mulvihill, for appellant.

Glenn E. Hoover, for respondent.

MOUNT, J.—The plaintiff brought this action to recover for services alleged to have been performed under a contract with School District No. 301, of Snohomish county, from November 7, 1913, to December 19, of the same year. Upon issues made, the cause was tried to the court without a jury.

¹Reported in 147 Pac. 637.

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Upon the trial the court found in favor of the plaintiff, and entered judgment against the district for the sum of \$225. The defendant has appealed.

The appellant argues that the respondent was employed by a majority of the directors of the district to superintend the schools of the district; that because there was no vacancy in that office, the board of directors were not authorized to employ the respondent; and cites *Barry v. Goad*, 89 Cal. 215, 26 Pac. 785, to that effect.

If the facts warranted the conclusion that the respondent was employed only as superintendent, the position of the appellant would no doubt be well founded. But the trial court found:

"That on the 20th day of September, 1913, plaintiff and defendant herein entered into a written contract, according to the terms of which, plaintiff was to teach in the public schools of defendant school district for a term of eight and one-half months at a salary of \$150 per month, which contract was approved of and registered in the office of the county superintendent of schools of Snohomish county, and a copy of which is now in possession of defendant."

The court also found that, in the month of October and the first week of November, 1913, the respondent was designated to teach, and did teach, in the 7th grade in the Garfield school in that district, and was paid for his services at the rate of \$150 per month. That after November 7, and until December 19, the respondent performed services in the manual training department in the schools, and held himself in readiness to perform this service, or other services as teacher in the schools. That for this service after November 7, the respondent had not been paid.

The contract upon its face shows that the respondent was employed to teach in the schools of the district, and that he and the directors, or a majority thereof, executed the ordinary teacher's contract. There is evidence in the record that the respondent was first employed as superintendent, but the record is clear that he was prevented from assuming the

duties of that office and was thereafter assigned to teach in one of the schools, and subsequently in the manual training department. Having performed the services under a regular contract approved by the county superintendent, he was clearly entitled to payment for such services, not as superintendent, but as a teacher in the district. Under the facts found by the trial court, which are abundantly supported by the evidence, the conclusion necessarily follows that the respondent was entitled to recover the amount which was awarded by the judgment.

We find no substantial merit in the appeal, and the judgment is therefore affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ.,
CONCUR.

[No. 12676. Department One. April 12, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Robert
Young, Plaintiff*, v. THE SUPERIOR COURT FOR
SPOKANE COUNTY, *Respondent*.¹

HUSBAND AND WIFE—ACTION FOR SEPARATE MAINTENANCE—TEMPORARY MAINTENANCE AND SUIT MONEY. An action by a wife for separate maintenance being within the inherent jurisdiction of a court of equitable cognizance, independently of statute, the court may award temporary maintenance and suit money pending the action; and the fact that the only express statutory authority for such relief is restricted to divorce suits cannot be construed by implication as excluding such relief in an action for separate maintenance.

Certiorari to review an order of the superior court for Spokane county, Blake, J., entered March 2, 1915, requiring the payment of temporary maintenance and suit money pending an action for separate maintenance. Affirmed.

Farnham & Lloyd and Charles E. Swan, for plaintiff.

¹Reported in 147 Pac. 436.

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PARKER, J.—This is a certiorari proceeding, wherein the relator seeks review and reversal of an order of the superior court for Spokane county requiring him to pay to his wife, Elsie Young, \$25 per month for her temporary maintenance and \$50 suit money, pending her action in that court against him for separate maintenance.

The record before us renders it clear that relator admits the existence of the marriage relation between himself and Elsie Young. We also think the record renders it plain that the trial court did not abuse its discretion in making the order sought to be reversed, assuming that such an order may be lawfully made in an action by a wife seeking only separate maintenance.

The principal contention of counsel for relator, and the only one we regard worthy of serious consideration here, is that the superior court has no power under any circumstances to award temporary maintenance and suit money pending an action for separate maintenance by a wife. This contention seems to be rested upon the theory that such power must be found, if at all, in some statute law. It is the settled law of this state that an action for separate maintenance may be maintained by a wife, though we have no statute upon that subject. *Kimble v. Kimble*, 17 Wash. 75, 49 Pac. 216; *Branscheid v. Branscheid*, 27 Wash. 368, 67 Pac. 812. Counsel for relator seems to rest his contention, in some measure, upon the fact that our divorce statute makes express provision for awarding to the wife temporary maintenance and suit money pending an action for divorce; and this, it is insisted, excludes the idea of such temporary relief in a separate maintenance action. We think, however, that since the wife's right to wage a separate maintenance action does not rest upon statute, but exists independent thereof, her right to such temporary relief in connection therewith is also to be determined independent of the provisions of our divorce statute relating to temporary maintenance and suit money.

In *State ex rel. Lloyd v. Superior Court*, 55 Wash. 347, 104 Pac. 771, 25 L. R. A. (N. S.) 387, we held that when the marriage is denied in such an action and that becomes one of the main issues therein, the trial court cannot grant such temporary relief. That holding, however, is not determinative of the problem here for solution, where the marriage is admitted.

In *Milliron v. Milliron*, 9 S. D. 181, 68 N. W. 286, 62 Am. St. 863, this question was reviewed. Judge Fuller speaking for the court said:

"Independently of statute, the subject is inherently within the general jurisdiction of a court of equity, and our attention has been called to no act of the legislature designed to limit such courts to cases which include in the relief sought a prayer for an absolute divorce. The true rule is that although the statute make no provision for temporary alimony, as an incident to an action for separate maintenance, where no decree for a divorce is prayed for, a court of equity is not precluded, in a proper case, from compelling the husband to maintain his wife and provide suit money with which to enable her to prosecute or defend the action. *Daniels v. Daniels* (Colo. Sup.) 10 Pac. 657; *Verner v. Verner*, 62 Miss. 260; *Galland v. Galland*, 38 Cal. 265; *Simpson v. Simpson*, (Iowa) 59 N. W. 22; *Miller v. Miller*, (Fla.) 15 So. 222; *Johnson v. Johnson*, 125 Ill. 510, 16 N. E. 891; *Harding v. Harding*, 144 Ill. 588, 132 N. E. 206; *Vreeland v. Vreeland*, 18 N. J. Eq. 43; 2 Nels. Div. & Sep. p. 973, and cases there collected. In the case of *Glover v. Glover*, 16 Ala. 440, the court says: 'The broad ground upon which the jurisdiction is made to rest is the unquestioned duty of the husband to support the wife, and the inadequacy of legal remedies to enforce this duty.'"

In 1 R. C. L. p. 903, the learned editors observe:

"A woman who is compelled, through her husband's fault, to live apart from him, may, in many jurisdictions, maintain a suit for separate maintenance or permanent alimony, without being forced to seek a divorce. In such a proceeding the court has power to award alimony *pendente lite* even though the statute contains no express grant of authority to make such an order except in the case of a suit for divorce."

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Statement of Case.

In the text of 21 Cyc. 1604, the same view is stated and numerous decisions cited in support thereof, though recognizing that there are some decisions not in harmony therewith.

We conclude that the weight of authority, as well as the better reason, supports the conclusion that the superior court has power to enter the order sought to be reversed. For these reasons, the order is affirmed.

MORRIS, C. J., HOLCOMB, MOUNT, and CHADWICK, JJ.,
concur.

[No. 12135. Department Two. April 13, 1915.]

GRACE ANGUS, *Respondent*, v. GEORGE A. DOWNS,
Appellant.¹

BILLS AND NOTES—BONA FIDE PURCHASERS—DEFENSES AVAILABLE—THEFT BEFORE DELIVERY. A holder in due course of commercial paper may recover thereon, although the instrument was originally stolen from the maker thereof; in view of Rem. & Bal. Code, § 3407, which provides that where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed; this, under the maxim that, where one of two innocent persons must suffer by the wrong of another, he whose act made the loss possible must suffer.

BILLS AND NOTES—ACTIONS—QUESTIONS FOR JURY. In an action upon a promissory note, a directed verdict for plaintiff was proper, where she testified that she had paid value for the note without notice of any kind that defendant disputed his liability thereon, which testimony was corroborated by circumstances surrounding the transaction and by other witnesses; and there was no offer to combat plaintiff's evidence that she was a holder in good faith.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered December 26, 1913, upon the verdict of a jury rendered in favor of the plaintiff, by di-

¹Reported in 147 Pac. 630.

rection of the court, in an action upon a promissory note. Affirmed.

Mulligan & Bardsley, for appellant.

George W. Shaefer, for respondent.

FULLERTON, J.—This is an action brought by the respondent, Grace Angus, against the appellant, George A. Downs, to recover upon a promissory note. In her complaint the respondent alleged that the note had been assigned to her for value, prior to maturity, and that she was a holder thereof in due course. The appellant interposed two defenses, first, that the note was stolen from his possession prior to delivery, and second, that the respondent was not a holder of the note in due course. At the trial, which was being had before the court and a jury, the respondent introduced testimony tending to establish the allegations of her complaint. The appellant thereupon offered to show that the note was stolen from his possession after its execution and that there had been in fact no delivery of the note by him or on his behalf, but made no offer to combat the evidence of the respondent to the effect that she was a holder in due course. On objection by the respondent, the proffered evidence was excluded, and the jury instructed to return a verdict for the respondent for the amount due upon the note. A verdict was so returned, and judgment subsequently entered thereon. This appeal is prosecuted from the judgment so entered.

The appellant's assignments of error are based upon the ruling of the court excluding the proffered evidence. He first contends that a holder of commercial paper, although received by him in due course, cannot recover thereon against a maker from whose possession it has been taken before delivery by theft. His learned counsel argue that the question is not controlled by the negotiable instruments act, and they cite many cases, decided under the common law rules applicable to the law merchant, which sustain the principle that recovery cannot be had under such circumstances. There are,

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however, many cases maintaining the contrary rule, and were we to conclude that the act cited is without application to the question, it would be an interesting inquiry to ascertain with which side lay the better reason. But we think the act itself controlling. Section 16 of the original act (Rem. & Bal. Code, § 3407; P. C. 357 § 31) provides:

“Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.” Laws 1899, p. 344, § 16.

This section, it will be observed, provides in terms that, where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. Language could hardly be made plainer, and is as applicable to a holder in due course of commercial paper stolen before delivery as it is to commercial paper stolen subsequent to delivery, or commercial paper the title to which is defective for any other reason.

Our attention has not been called to many adjudicated cases where this precise question was at issue. In *Greeser v. Sugarman*, 76 N. Y. Supp. 922, the defendant executed a promissory note payable to the order of himself. It reached the hands of a holder in due course, who brought an action thereon. The defendant sought to defend on the ground that it was lost or stolen from his desk, and that there was hence

no valid delivery of the note. The court, quoting the section of the negotiable instruments law of New York corresponding to the section quoted above, held that the fact if shown would constitute no defense to the action.

In *Poess v. Twelfth Ward Bank*, 86 N. Y. Supp. 857, the plaintiff held a certified check on the bank named drawn by himself against his own deposit. Sometime thereafter he indorsed the check in blank and made out a deposit slip for redeposit in the bank. On the way to the bank he lost the check, and about five days thereafter it came up through the exchange for collection from another bank which had cashed it. The plaintiff sued the bank for the amount of the deposit, but the court held he could not recover; the court saying that the title of the bank cashing the check, since it recovered it in due course, "was not affected by the fact that it had been stolen, and never had a valid delivery."

In *Buzzell v. Tobin*, 201 Mass. 1, 86 N. E. 923, the defendant sought to defend against the suit of an indorsee of his check on the ground that the check had been delivered by his clerk without authority, and hence was unlawfully in circulation, and no title passed by its subsequent negotiation. But the court held the check valid in the hands of a holder in due course, under the section of the negotiable instruments law of that state corresponding to the section of the law from our state which we have quoted.

The commentators on the negotiable instruments act are seemingly in accord with the interpretation thus given by the courts to this section of the act. Daniel on Negotiable Instruments, vol. 1, § 838 (6th ed.), after discussing the conflict of authority existing on the question prior to the statute, uses this language:

"While the statute provides that every contract on a negotiable instrument is incomplete and revocable until delivery, it further declares that where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is

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conclusively presumed. So that, in those states which have enacted the statute, the conflict of authority discussed in the foregoing sections is settled against the rule that a maker is not liable unless he has been guilty of negligence, and in favor of the protection of an innocent purchaser, as to whom a valid delivery is conclusively presumed."

And the editors of Ruling Case Law, under the title, Bills and Notes, vol. 8, at § 233, use this language:

"As a general rule, a negotiable promissory note, like any other written contract, has no legal inception or valid existence, as such, until it has been delivered in accordance with the purpose and intent of the parties. There accordingly is no doubt that delivery of a negotiable instrument is necessary to create any liability as between the immediate parties. But the authorities have long been in violent conflict as to whether a *bona fide* holder can recover on an instrument which has never been delivered by the maker or drawer to any one for any purpose. Some courts have held that delivery is not essential to the validity of an instrument in the hands of a due course holder. And this rule has been declared to be applicable in case the instrument has been taken from the maker's possession by theft. On the other hand many courts have taken the view that an innocent holder for value of paper commercial and negotiable in form, but which has never been completed by delivery, cannot acquire rights thereto against the alleged maker. And it has been held that a negotiable security, stolen from the maker before it has become effective as an obligation by actual or constructive delivery, may not be enforced by any subsequent innocent holder. These courts have reasoned that the wrongful act of a thief or a trespasser may deprive the holder of his property in a note which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value, but that a note in the hands of the maker before delivery is not property, nor the subject of ownership, as such; it is, in law, but a blank piece of paper. Sound reason would seem to require the question to be resolved with a view to the facts of the particular case and the principles of negligence. No doubt, where the maker of a negotiable instrument negligently allows the same to get into circulation, he should be held liable to a *bona fide* holder upon the ground

that he is estopped by his own negligence to deny a valid delivery. The maxim declaring that where one of two innocent persons must suffer by reason of the wrong of a third party, he whose act made the wrong possible should bear the loss, should apply with full force. But it is somewhat shocking to suppose that the maker having exercised due care may be deprived of his property without his consent. Nevertheless this is clearly the intention of the negotiable instruments law, which declares that 'where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed.' This principle applies only to complete instruments, however, for it is declared, also, by the act that 'where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.'"

See, also, Crawford's Negotiable Instruments Law (3d ed.), § 35, par. (c); Ogden, Negotiable Instruments, p. 284. We conclude, therefore, that it is not a defense against the suit of a holder in due course of commercial paper to show that the paper was stolen from the maker thereof prior to delivery.

The appellant next contends that there was sufficient evidence to send the case to the jury on the question of the respondent's good faith, but we differ with him upon this contention also. The respondent testified that she paid value for the note, and that she had at the time no notice of any kind that the appellant disputed his liability thereon. In this she is corroborated, not only by the circumstances surrounding the transaction, but by other witnesses as well. Nothing was offered to contradict this testimony, and we think it an instance where the trial court could well say there was no fact in dispute for the consideration of the jury.

The judgment is affirmed.

CROW, ELLIS, MOUNT, and MAIN, JJ., concur.

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Statement of Case.

[No. 12154. Department One. April 13, 1915.]

CHARLES L. GILLETTE *et al.*, Respondents, v. C. H. ANDERSON
et al., Appellants.¹

EXCHANGE OF PROPERTY—VALIDITY—FRAUDULENT REPRESENTATIONS—MATERIALITY. Plaintiffs are entitled to rescission of a contract and cancellation of a deed given in exchange for a hotel lease and furniture, on the ground of false and fraudulent representations, where the defendants represented to plaintiffs that the hotel had a good patronage and was a money maker, making a profit of from \$200 to \$450 per month, according to the college season, whereas the hotel had been a losing proposition at all times, and further represented that the furniture was clear of incumbrances, when in fact it was subject to a chattel mortgage for \$750, upon which fraudulent representations plaintiffs relied in making the exchange.

EXCHANGE OF PROPERTY—RESCISSION—TIME. A delay of three months in claiming rescission of a contract for the purchase of a hotel would not constitute a waiver of the right, where the party seeking rescission had merely waited until the falsity of the representation that the larger part of the profits of the hotel would be realized during the college year had been fully demonstrated; since the fact that the purchasers had examined the hotel in advance would not be sufficient in itself to put them upon notice as to the constancy of its business or the ordinary receipts, such matters being within the knowledge of the vendors only, upon whose representations the purchasers would be justified in relying.

SALES—FRAUD—FALSITY—INCUMBRANCE. A representation by a vendor of hotel furniture that there was no incumbrance on it would be fraudulent as to the purchaser, when in fact there was an existing chattel mortgage thereon, even if, under the advice of his attorney, the vendor did not deem the mortgage a valid lien.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 10, 1914, upon findings in favor of the plaintiffs, in an action for cancellation. Affirmed.

Van Dyke & Thomas, for appellants.

Earle & Steinert, for respondents.

¹Reported in 147 Pac. 634.

CROW, J.—This action was commenced by Charles L. Gillette and Mabel V. Gillette, his wife, against C. H. Anderson and Violet Anderson, his wife, to rescind a contract and cancel a deed by which plaintiffs had conveyed certain real estate to defendants. From a judgment in plaintiffs' favor, the defendants have appealed.

On and prior to June 22, 1913, respondents were the owners of two lots, improved with a dwelling house, in the plat of Rainier Beach, in King county, subject to a \$1,000 mortgage, and liens for taxes and special assessments. Appellants were the owners of a building known as the Lakeside hotel, located in Brooklyn addition to Seattle. They also owned the furniture in the hotel. This hotel, which recently had been conducted by appellants and other parties as a lodging and boarding house, was located in the university district, and was patronized by university students, as well as other roomers and boarders. Between June 21 and June 28, 1913, appellant C. H. Anderson caused one E. B. Benson, his agent, to advertise the furniture and hotel business for sale, which he did by inserting the following advertisement in the Seattle Sun:

"Sickness forces owner of hotel, kitchen, dining and forty furnished rooms to lease, sell or trade for land or lots. Best of location, always full; a money maker; for man and wife, a fortune."

This advertisement challenged the attention of Mr. Gillette, who called on Mr. Benson and was by him referred to the appellant C. H. Anderson. Negotiations between the parties resulted in an agreement whereby respondents conveyed to appellants their lots in Rainier Beach subject to the \$1,000 mortgage, in consideration of which appellants transferred to them the furniture in the Lakeside hotel, and leased the hotel to them for three years, at a rental of eighty dollars per month for the first two months, \$100 for the third month, and \$125 per month thereafter, payable monthly in advance. Appellants were to allow respondents a credit of

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\$600 additional as boot in the trade, \$160 of which was to be applied in satisfaction of the first two months' rent of the hotel; a portion was to be applied in payment of taxes and assessment liens upon the Rainier Beach lots, a commission for an extension of the mortgage thereon, and a portion was to be applied on the last rentals which would fall due on the lease. Respondents claim that appellants were to pay \$50 to them in cash. This appellants denied. Respondents took possession of the hotel and furniture about July 15, 1913, and held the same until October 21, 1913. In September, 1913, respondents, claiming they had been defrauded, tendered a surrender of the lease and hotel, demanded a reconveyance of the Rainier Beach lots, and commenced this action for a rescission. They alleged, and the trial court found, that appellants had made numerous false and fraudulent representations, upon which respondents relied. We will mention two only of these representations, which we regard as sufficiently material, false and fraudulent, to require an affirmance of the judgment.

It appears from the evidence that appellants had personally conducted the hotel; that they represented to respondents it had a good patronage, was a money maker, had made them a profit of \$200 to \$450 per month, would make at least \$200 per month during the university summer school, and during the regular college year had made as much as \$450 per month profit; that respondents relied upon these representations; that they were false and known to appellants to be false, and that the hotel had been a losing proposition at all times. The evidence further shows that, for a short time before the appellants sold the furniture and leased the hotel to respondents, one Atkeson owned the furniture and had an assignment of a lease on the hotel; that on November 18, 1912, while he held the furniture, he executed and delivered a chattel mortgage thereon to one Mackie, for \$750, which was not filed with the county auditor until March 15, 1913; that he defaulted to appellants for his rent; that

appellants obtained a judgment against him under which the furniture was sold on execution on June 2, 1913, at sheriff's sale, subject to the chattel mortgage, and was purchased by appellants; that although appellants knew of the chattel mortgage before and at the date of the sheriff's sale, they falsely and fraudulently represented to respondents that the furniture was clear of incumbrance; and that respondents relied upon such statement. All of these fraudulent acts, and others not here mentioned, were found by the trial judge. We have carefully examined the evidence and conclude that, in every particular, it clearly sustains the findings made.

Appellants insist that respondents are not entitled to rescind, for the reason that they examined the hotel before they made the purchase; that they took possession and remained in possession from July 15, 1913, until October 21, 1913; that they paid \$100 rent in advance for the third month of the lease; that they had ample time to learn of the existence of any alleged false and fraudulent representations on the part of appellants, and that they should not be permitted to rescind at this time. The evidence shows that appellants told respondents the hotel had made and would make the most money during the regular college year, which did not commence until some time in September. Respondents could not learn the entire falsity of appellants' representations until that time. As soon as they did learn it, they demanded a rescission, and tendered to appellants a surrender of the lease and hotel. In *Johnson v. Ryan*, 62 Wash. 60, 112 Pac. 1114, a similar state of facts was presented, and we there held that the fact that the purchasers examined the hotel in advance was not in itself sufficient to put them upon notice as to the constancy of the business or the ordinary receipts, such facts in the nature of things being known only to the vendors upon whose representations the purchasers were justified in relying. Here the reasonable time required to ascertain the falsity of appellants' representations would necessarily extend into the month of September, when the

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regular school year at the university would commence, and the larger part of the profits represented by appellants would be realized, if at all. Respondents acted with due diligence in rescinding the contract.

Appellants further contend that they had been advised by their attorney that the chattel mortgage executed by Atkeson was not a valid lien when they made the sale to respondents. They knew of the existence of the mortgage, and that Mackie was attempting to foreclose it. They certainly knew that respondents did not want to buy a lawsuit. It was their duty in good faith to advise respondents of the facts, and not subject them to the necessity of defending their title to the furniture. From the entire record, we are satisfied that the appellants deliberately defrauded respondents and induced them to purchase a hotel which appellants knew had always been a losing proposition.

The contract was properly rescinded, and the judgment is affirmed.

MORRIS, C. J., PARKER, and CHADWICK, JJ., concur.

[No. 12275. Department One. April 13, 1915.]

G. W. BOLLEN, *Respondent*, v. NORTHERN GRAIN &
WAREHOUSE COMPANY, *Appellant*.¹

SALES—LIABILITY OF BUYER—WHEAT IN WAREHOUSE. Where a warehouseman accepted wheat, making advances and giving a warehouse receipt therefor, under an agreement that sale was to be made on a future day when the grower should be satisfied with the market, and a grain company repaid the advances made on the wheat by the warehouseman, on his draft therefor accompanied by the indorsed warehouse receipt, and shipments from this wheat were made on the orders of the grain company, the grain company cannot claim that the money advanced was a loan and not an advancement on the future sale as per agreement, and hence would be liable to the seller for the market price on the day set by him for the sale, regardless of the fact that there was not enough wheat in the warehouse at that time to cover the amount called for by the warehouse receipt.

Appeal from a judgment of the superior court for Spokane county, Steiner, J., entered April 9, 1914, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

John Pattison (Coy Burnett, of counsel), for appellant.

W. E. Southard and T. B. Southard, for respondent.

MOUNT, J.—This action was brought by the respondent to recover the value of two separate lots of wheat sold and delivered to the appellant. Upon issues joined, a judgment was rendered in favor of the plaintiff for the amount prayed for in his complaint. The defendant has appealed.

The facts are as follows: In February, 1913, the respondent delivered to one A. E. Nicholls, who was operating a warehouse at Wilson Creek, in Grant county, two lots of wheat. One of these lots was 1,813 14-60 bushels No. 1 bluestem wheat, and the other was 476 25-60 bushels of Sonora wheat, for which regular warehouse receipts were issued to the respondent. The appellant concedes that it is

¹Reported in 147 Pac. 636.

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liable for the Sonora wheat and, therefore, we shall not consider that item.

A. E. Nicholls, who operated the warehouse, was authorized by the appellant to purchase all the wheat that came into his warehouse at the market price, and for his services was to be paid by the appellant $2\frac{1}{2}$ cents per bushel above the market price. When the respondent stored the bluestem wheat in the warehouse, Mr. Nicholls issued a regular warehouse receipt therefor, and delivered the same to the respondent. The respondent did not desire to sell his wheat at that time, but desired an advancement upon the wheat. Mr. Nicholls thereupon advanced \$1,087 upon the purchase price of the No. 1 bluestem wheat, with the agreement that the wheat would be sold to the appellant in the future on a day to be named when the respondent was satisfied with the market price. Mr. Nicholls thereupon drew his personal check in favor of the respondent for \$1,087, and took a receipt as follows:

"Wilson Creek, Wash., Feb. 10, 1913.

"Received of A. E. Nicholls for account of Northern Grain & Warehouse Co., \$1,087.00 on 1813 14-60 B. S. No. 1 wheat, same to be shipped to account of Northern Grain & Warehouse Co., or order.

"Interest on same to be paid at the rate of 8% per annum.

"A. E. Nicholls.

"Original.

"Accepted, G. W. Bollen."

At the same time the respondent indorsed upon the back of the warehouse receipt the following:

"For consignment to Northern Grain & Warehouse Co., G. W. Bollen."

The receipt copied above, and the warehouse receipt indorsed as stated, were attached to a draft which was sent by Mr. Nicholls to the Northern Grain & Warehouse Company, and this draft was paid to Mr. Nicholls by that company. Thereafter, upon orders from the Northern Grain & Warehouse Company, Mr. Nicholls shipped out of the warehouse

this particular wheat, and other grain. Thereafter, on the 5th day of July, 1913, the respondent informed the appellant that he was ready to sell his wheat for the market price on that day, and demanded the balance due upon the wheat, after deducting interest and warehouse charges. This balance amounted to \$392.15. About this time, it was discovered by the appellant that there was not sufficient wheat in the warehouse to cover the warehouse receipt, and for that reason it refused to pay the respondent for his wheat. This action was thereupon brought, with the result as above stated.

Upon the trial the court found, among other things:

"That the wheat was shipped to the defendant by the said A. E. Nicholls pursuant to an agreement, which was entered into at the time Bollen indorsed the said receipts to the said defendant."

It is argued by the appellant that the \$1,087 advanced to Mr. Bollen was a loan and not an advancement upon the purchase price of the wheat; that Mr. Nicholls, the warehouseman, was the agent of Mr. Bollen, and that if the wheat was not in the warehouse, or had been lost, it was the loss of Mr. Bollen, and not of the appellant; and that instead of being liable for the value of the wheat, the appellant is entitled to a judgment against Mr. Bollen for the amount of the loan, with interest.

The question whether Mr. Nicholls, the warehouseman, was the agent of Mr. Bollen, who deposited the wheat, or of the Northern Grain & Warehouse Company, who advanced the money upon the warehouse receipt, is of no material importance. The controlling question, in our opinion, is, Was the wheat delivered to the appellant? If the appellant received the wheat, it was bound to pay to Mr. Bollen the agreed purchase price thereof. And whether Mr. Nicholls was the agent for one or the other for the purpose of holding the wheat is entirely immaterial.

The trial court found as a matter of fact that this particular wheat was shipped out of the warehouse upon the or-

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der of the appellant. This finding is based upon positive and competent evidence to that effect. Mr. France for the appellant testified that the wheat was not received by the appellant. But it was admitted that on different occasions wheat of this kind was ordered shipped. Mr. Nicholls testified that bluestem wheat was ordered shipped to Seattle and Portland by the appellant, and knowing that the appellant held the warehouse receipt for this particular bluestem wheat, he shipped it out upon such order without the production of the warehouse receipt. If it was so shipped, then clearly the appellant is liable to the respondent for the value of the wheat. This value was stipulated at the trial to be the market price on July 5, 1913. This being the fact found by the court upon competent evidence, it follows of course that the appellant is liable to the plaintiff for the wheat so shipped. The fact that there was not enough wheat left in the warehouse to cover the amount for which warehouse receipts had been issued, did not relieve the appellant from paying the respondent for this wheat.

The judgment must therefore be affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ.,
concur.

[No. 12433. Department Two. April 13, 1915.]

JOHN B. FOGARTY, *Administrator, Respondent*, v. NORTHERN
PACIFIC RAILWAY COMPANY, *Appellant*.¹

APPEAL—DECISION—LAW OF THE CASE. Where an action for wrongful death was reversed on appeal merely on the ground of failure to segregate the damages accruing to various beneficiaries and an inadequate instruction on the measure of damages, on a second appeal on substantially the same evidence, issues as to the primary negligence of defendant and the contributory negligence of deceased upheld on the first appeal are foreclosed.

APPEAL—EXCEPTIONS—NECESSITY—INSTRUCTIONS. In the absence of exceptions to the giving or refusal of instructions, it must be assumed on appeal that those given correctly stated the applicable law, and all of it.

DEATH—STATUTES—NEW CAUSE OF ACTION—AMOUNT OF RECOVERY. The Federal employers' liability act must be construed, like the statute giving a right of action for wrongful death, as granting a new and independent cause of action for the benefit of the dependent relatives named in the statute, and the damages recoverable are limited to the financial loss sustained by their being deprived of a reasonable expectation of pecuniary benefit by the wrongful death.

DEATH—ABANDONMENT OF WIFE AND CHILD—EFFECT. The abandonment of a wife and child by the husband and father, with the intention of not supporting them, his ability to do so being shown, would not deprive them of a right to recover for his wrongful death, under the provisions of the Federal employers' liability act, since there was a legal duty on deceased's part to furnish assistance and support to his wife and child, and the fact of abandonment would be material only in mitigation of damages.

APPEAL—REVIEW—VERDICT—CONCLUSIVENESS. Where the evidence was conflicting, the supreme court on appeal will not set aside the verdict of the jury, especially after the refusal of the court who heard the evidence to grant a new trial thereon.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered June 17, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

¹Reported in 147 Pac. 652.

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Englehart & Rigg, for appellant.

William M. Thompson and *H. J. Snively* (*Charles Del Bondio*, of counsel), for respondent.

ELLIS, J.—This is an action on behalf of the widow and minor child of Frank Edward Myers to recover damages for his death caused by the derailment of an engine hauling an interstate passenger train of the defendant upon which he was working as fireman. It is predicated upon the Federal employers' liability act. The case is here for the second time on appeal. The first trial resulted in a verdict in a lump sum for \$20,000, which the trial court reduced to \$12,500. The judgment was reversed for failure to segregate the damages accruing to each beneficiary and for an inadequate instruction as to the measure of damages. *Fogarty v. Northern Pac. R. Co.*, 74 Wash. 397, 133 Pac. 609. In conformity with that decision, the complaint was amended by segregating the damages claimed for each beneficiary. The answer tendered the general issue and the affirmative defenses of contributory negligence and prior abandonment of and failure to support his wife and child by the deceased. These defenses were traversed by the reply.

The issues as to the primary negligence of the defendant and the contributory negligence of the deceased are foreclosed by our decision on the first appeal. The evidence touching these questions was substantially the same as that adduced at the first trial.

Touching the defense of abandonment, the evidence shows that the deceased and Sarah E. Myers were married at Leeds, South Dakota, October 28, 1903, and that there was born as the issue of that marriage a daughter, Reva Myers, on October 6, 1904. There is also evidence tending to show that, about five years before his death, the deceased had abandoned his wife and child; that since that time he had contributed practically nothing to their support; that almost continuously since his desertion she had been seeking

him, visiting many railroad centers and division points with a view to reconciliation; that he had told others that he had permanently abandoned his wife and had repudiated his paternity of the child; that neither of the spouses had ever secured a divorce; that the child, since about a year after the abandonment, had resided with the wife's aunt, who was fond of the child and was willing to adopt her; that the abandoned wife had been supporting herself by labor as a domestic; that the deceased was, at the time of his death, a railroad fireman earning \$95 to \$125 a month, and in a short time would have been eligible to promotion to the position of engineer carrying monthly pay amounting to \$150, and that he was a young man twenty-six years of age, intelligent, healthy, attentive to work and of sober and industrious habits. The defendant sought to show that the wife by her conduct had forfeited all right to support by the deceased. There was a sharp conflict of evidence as to her character and conduct. There was testimony tending to show that, subsequent to the desertion, she had led a more or less dissolute life. There was also evidence to the contrary.

The jury returned a verdict for the plaintiff in the sum of \$7,000, apportioning \$2,500 to the widow and \$4,500 to the child. Motions for judgment *non obstante* and for a new trial were overruled. From these orders and the final judgment on the verdict, the defendant appeals.

No exception was taken to the giving of or the refusal to give any instruction, nor is any error assigned thereon. We must assume that the instructions given correctly stated the applicable law and all of it. *Johnson v. Johnson*, ante p. 18, 147 Pac. 649.

The appellant's argument is directed to two contentions, (1) that the undisputed evidence shows that neither the widow nor the minor child had any reasonable expectation of ever receiving any assistance or support from the de-

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ceased; (2) that in any event the widow had forfeited all right to any assistance or support.

I. It is now thoroughly settled that the Federal employers' liability act, in its essentials, follows the first English law on the subject, that of 9 and 10 Victoria, known as Lord Campbell's act, and must be construed as that act has been construed, not as a mere continuance of the right of the injured employee in favor of his estate, but as granting a new and independent cause of action for the benefit of the dependent relatives named in the statute, and that the damages recoverable are limited to the financial loss sustained by their being deprived of a reasonable expectation of pecuniary benefit by the wrongful death. *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59; *American R. Co. of Porto Rico v. Didrickson*, 227 U. S. 145; *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173.

In its final analysis, the appellant's argument is reduced to the claim that, in case of abandonment, the jury should not be permitted to speculate upon the possibility of a reconciliation. It ignores the legally enforceable liability of a husband and father to support his wife and child to the extent of his reasonable ability. This argument is based mainly upon the case of *Michigan Cent. R. Co. v. Vreeland*, *supra*, where it is said:

"The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings. . . .

"A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, 'not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon

which, in the nature of things, it is not possible to set a pecuniary valuation.' Patterson, Railway Accident Law, § 401.

"Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation."

This language clearly construes the statute as basing the right of recovery on "some reasonable expectation of pecuniary assistance or support." We do not construe this, however, as meaning that the legal duty of the injured person to support the beneficiary is to be wholly disregarded as a factor in the ground of recovery. While the court there said that this legal liability "is not the sole test," it has not said that it is not one of the tests in a case where it is present. On the contrary, the use of the word "sole" implies that it is one of the tests. The language of the court above quoted was not meant to eliminate any consideration of the legal liability, but to save, as within the benefits of the act, those cases where there is no legal liability but where there is a loss of a prospective benefit, though not one to which the beneficiary is legally entitled. The court, in the *Vreeland* decision, recognizes this distinction as follows:

"The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, 'according as the action is brought for the benefit of the husband, wife, minor child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.' Tifany, Death by Wrongful Act, §§ 158, 160, 161, 162."

If, therefore, in addition to the legal liability, there was shown an earning power and capacity of the deceased, such that, had he lived, the legal right to pecuniary assistance

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or support might have been enforced as a thing real and measurable, pecuniarily valuable, then it cannot be said, as a matter of law, that there was no reasonable expectation of such assistance or support, even though it had not theretofore been voluntarily given. Such legal liability accompanied by proof of ability of the deceased to have met the legal duty, also meets the other requisite read into the act by the United States Supreme Court in the *Vreeland* decision in defining "the pecuniary loss and damage" as "one which can be measured by some standard." The legally enforceable liability and the actual ability of the deceased to have met it furnishes a standard of measurement pecuniary in its nature, just as would be furnished by the antecedent voluntary performance of the legal duty. To hold otherwise would be to hold the right to enforce assistance or support by the wife and child a thing of no pecuniary value. This, so far as we are advised, no court has ever held.

The *Vreeland* decision did not eliminate the legal liability as a factor. The whole argument is directed to an elimination of recovery by the surviving spouse for loss of "society and companionship," and "grief and sorrow," or damages as "balm to her feelings," because these things are not capable of measurement by any "material standard." This is the sum and substance of that decision. The judgment was reversed solely because of an instruction that the jury should estimate the financial value to the widow of "care and advice from their own experience as men."

The decision in *American R. Co. of Porto Rico v. Didricksen*, *supra*, went no further than to apply the same rule as to an instruction allowing a recovery for loss of "care and consideration" claimed by the parents for the death of a son. The court said: "The loss of the society or companionship of a son is a deprivation not to be measured by any money standard." The judgment was reversed on that ground alone.

The decision in *Gulf, C. & S. F. R. Co. v. McGinnis*, *supra*, follows the rule announced in the other two decisions and holds that a married daughter of the deceased, who was not dependent upon the deceased for support (and who we may note in passing had no legal claim upon him for support), could not recover for his death because she had "no reasonable expectation of any pecuniary benefit as a result of a continuation of his life." This is far from saying that had the deceased been under a legal liability for her support that such legal liability, supplemented by proof of his reasonable ability to supply that support, would not have made a case of loss of "reasonable expectation of pecuniary benefit" on her part.

The three decisions above cited and discussed were made the basis of our decision on the first appeal in this case. The instruction there quoted was held erroneous because it fixed "legal duty independent of pecuniary benefits" as the measure of damages. We did not say, nor did we mean to imply, that the legal duty supplemented by proof of financial ability or earning power, would not furnish a financially measurable criterion of the pecuniary benefits of which the wife and child had reasonable expectation. Obviously that expectation would be reasonable because legally enforceable. Had we then meant to hold otherwise, the case would have been dismissed without remanding for a new trial.

There having been a legal duty on the part of the deceased to furnish assistance and support to the wife and child, and he having been able through his clearly proven earning power to meet that duty, the fact of his abandonment was only material in mitigation of the damages to them occasioned by his death. *Creamer v. Moran Brothers Co.*, 41 Wash. 636, 84 Pac. 592; *Beaumont Traction Co. v. Dilworth* (Tex. Civ. App.), 94 S. W. 352, 357; *Wood v. Philadelphia, B. & W. R. Co.* (Del. Sup'r Ct.), 76 Atl. 613, 617. But it is not contended that the damages awarded are excessive if any damages are recoverable.

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At least one Federal court has held that evidence of a separation short of a decree of divorce, either *a mensa* or *a vinculo*, is no bar to a recovery under the Federal employers' liability act. *Dunbar v. Charleston & W. C. R. Co.*, 186 Fed. 175.

II. It may be conceded that had the undisputed evidence shown that the widow since being abandoned by the deceased had led a dissolute life such as to absolve the husband of all legal duty to support her, this would bar her recovery. *Ft. Worth & D. C. R. Co. v. Floyd* (Tex. Civ. App.), 21 S. W. 544. The evidence on this point, however, was conflicting. Its weight and the credibility of the witnesses were for the jury. The trial judge was much better able to determine the weight and credence to be given to this evidence than we are. He refused to grant a new trial. An appellate tribunal should be extremely slow to override the judgment of both the jury and the trial court on a question of fact where there is any evidence to support it. *Hertzog v. Star Logging Co.*, 73 Wash. 197, 131 Pac. 806; *Perkins v. Northern Pac. R. Co.*, 199 Fed. 712.

The judgment is affirmed.

MORRIS, C. J., CROW, FULLERTON, and MAIN, JJ., concur.

[No. 12493. Department One. April 13, 1915.]

EDWARD J. MARGETT *et al.*, Respondents, v. JOHN E. WILSON
et al., Appellants.¹

APPEAL—HARMLESS ERROR—REFUSAL OF CONTINUANCE. Under Rem. & Bal. Code, § 297, providing that new matter in a reply shall be deemed controverted without further pleading addressed thereto, the refusal of the court to grant a continuance to enable defendants to reply to new matter set up in the plaintiffs' amended reply, filed a few days before the case was set down for trial, was not prejudicial error, where the defense thereto was gone into fully at the trial.

WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS. An affidavit of a defendant that he and his deceased wife had conveyed away a tract of land, being admissible against him as a declaration against interest, would not be inadmissible against their children as hearsay; since whatever interest the children have comes through their deceased mother, and the alienation, if made by the parents, would be complete as against the children.

LOST INSTRUMENTS—LOST DEEDS—EVIDENCE—SUFFICIENCY. The rule that one who relies upon a lost deed to sustain his title must establish the original existence of the deed, its loss, and the material parts thereof by convincing evidence is met by the affidavit of the grantor setting forth that a quitclaim deed was executed and delivered by him to plaintiff's grantor, describing the property, the kind of deed, and the consideration therefor, which affidavit was corroborated by evidence showing that plaintiff's grantor and plaintiffs regularly paid the taxes each year thereafter, that the quitclaim was given to the holder of a mortgage for \$500 on the land in consideration of that debt and the payment of \$25 additional, and that the land at the time of the quitclaim deed was worth only \$400; although defendant testified that the \$25 was given as earnest money on an agreement to pay \$1,200 therefor, and that no part of the mortgage debt has ever been paid.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered April 4, 1914, upon findings in favor of the plaintiffs, in an action to quiet title, tried to the court. Affirmed.

Garland & McLane, for appellants.

C. D. Sutton and Hindman & Yakey, for respondents.

¹Reported in 147 Pac. 628.

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Opinion Per MOUNT, J.

MOUNT, J.—This action was brought by the plaintiffs to quiet title to 40 acres of land in Kitsap county. The defendants, after denying the allegations of the complaint, alleged by way of cross-complaint that they were the owners of the property, and prayed to have the title quieted as against the claims of the plaintiffs. The plaintiffs, for an amended reply, after denying the allegations of the affirmative defense, alleged that they and their predecessors in interest have had and held paper and color of title to said property and the whole thereof; that said property is vacant and unoccupied land; and that these plaintiffs and their predecessors have paid all taxes thereon for more than 7 successive years prior to the date of the commencement of this action. The case was tried to the court without a jury, and resulted in findings in favor of the plaintiffs, and a decree quieting the title in the plaintiffs. The defendants have appealed.

The facts are as follows: Prior to the year 1898, the defendant John E. Wilson and his wife, Minnie M. Wilson, were the owners of the land in controversy. On the 20th day of January of that year, Mr. and Mrs. Wilson executed and delivered to William W. Wilson, a brother of John E. Wilson, a promissory note for \$500, secured by a mortgage upon the land in controversy. This note and mortgage were negotiated by William W. Wilson to J. E. Crimmons, and afterwards, in the year 1904, came into the hands of John B. Yakey. The note at that time was past due and Mr. Yakey was threatening to foreclose upon the property. It is undisputed that this note and mortgage were never paid.

After the maturity of the note, according to the evidence on the part of the plaintiffs, Mr. Yakey was about to bring a suit to foreclose the mortgage. He stated to Mr. John E. Wilson that it would cost about \$25 to foreclose the mortgage and that he, Yakey, would surrender the note and pay to Mr. Wilson \$25 for a quitclaim deed to the property; and that Mr. and Mrs. Wilson thereupon agreed to this and

executed and delivered to Mr. Yakey a quitclaim deed of the property. Mr. Yakey testified that this deed was never recorded, was lost, and could not be found. In the year 1906, Mrs. Wilson died, leaving surviving her husband, John E. Wilson, Elmer Wilson, a son, and Sadie B. Wilson, a daughter. At the time this action was brought, Elmer Wilson was past 24 years of age, and Sadie was in her 15th year. It is conceded that no administrator was ever appointed for the estate of Minnie M. Wilson, deceased.

In the year 1909, after Mr. Yakey discovered that the quitclaim deed was lost, Mr. John E. Wilson made an affidavit as follows:

"John E. Wilson being first duly sworn on oath deposes and says: That he is the identical John E. Wilson, who, with his wife Minnie M. Wilson, made, executed and delivered to one William W. Wilson a certain mortgage on the following described land in Kitsap county, Washington, to wit:

"The southeast quarter ($SE\frac{1}{4}$) of the southeast quarter ($SE\frac{1}{4}$) of section ten (10), township twenty-three (23) north, range one (1) east W. M., containing forty (40) acres more or less.

"That said mortgage was given to secure the sum of \$500, with interest thereon at the rate of seven (7) per cent per annum from the date of said mortgage, to wit, January 20, 1898, and the same was thereafter duly filed for record in the office of the auditor of Kitsap county, Washington, and the same is now of record therein in volume 27 of Mortgages at page 306.

"That thereafter said mortgage and the note secured thereby passed into the hands of J. B. Yakey, of Port Orchard, Washington, who started or was about to start a foreclosure of the same against this affiant and his said wife. That no part of the principal or interest due on said note or said mortgage was ever paid by this affiant or his said wife.

"That on the 2nd day of December, or thereabouts in the year 1904, this affiant in order to satisfy said mortgage and in payment of the note secured thereby, and for the further consideration of the sum of \$25 in cash paid to this affiant and his said wife, Minnie M. Wilson, by the said J. B. Yakey,

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this affiant and his said wife, Minnie M. Wilson, made, executed and delivered to the said J. B. Yakey a quitclaim deed to all of the said land above described.

"This affiant further states that said sum of \$25 was actually paid to this affiant by the said J. B. Yakey, and said deed was executed for the purpose and upon the express condition that it was to satisfy and cancel said mortgage and relieve this affiant and his said wife from any further liability on said note or the said mortgage."

This affidavit was subscribed and sworn to on the 16th day of December, 1909, before a notary public.

The evidence on the part of the plaintiff also shows that, immediately after the date when this quitclaim deed was given to Mr. Yakey in 1904, he thereafter paid the taxes regularly upon the premises until February 27, 1913, when he sold and conveyed the premises by warranty deed to the plaintiffs. The plaintiffs' evidence also shows that the land was unimproved and unoccupied up to the time this action was brought.

The evidence on the part of the defendants was to the effect that Mr. Yakey represented to the defendant John E. Wilson that he held the note and mortgage for collection and demanded of Mr. Wilson that he pay the amount due thereon; that Mr. Wilson refused to make the payment upon the ground that he had not received any consideration for the note; that thereupon Mr. Yakey told the defendant that his client would pay \$1,200 for the property; that Mr. Wilson and his wife agreed to take the \$1,200, and \$25 thereof was paid to bind the bargain; that he and his wife executed a deed to the property, but that the deed was never delivered because the balance of the \$1,200 was never paid; that subsequently the deed was destroyed. The defendant John E. Wilson also testified that he offered to pay the taxes on the property each year, but that when he attempted to pay the taxes he was informed by the treasurer that the taxes had already been paid, and that the treasurer refused the tender which he made. Upon the question of the payment of taxes,

the record very clearly shows that the treasurer and his deputy, upon two different occasions, asked Mr. Wilson if he desired to pay the taxes upon this particular tract of land, and that Wilson informed them that he did not: "They beat me out of that eight or ten years ago; I do not own it."

In reference to the affidavit hereinabove set out, John E. Wilson admitted his signature thereto, and that he had sworn to it, but testified that he did not know the contents of it at the time. The evidence very clearly shows, however, that the affidavit was read to Mr. Wilson by Mr. Yakey at the time it was prepared, and on a subsequent date a week later, at the time the affidavit was signed, it was read to Mr. Wilson by the notary who administered the oath. It was shown that the land, at the time the quitclaim deed was given, was worth about \$400.

Numerous errors are assigned by the appellants which we think require but brief notice. It appears that when the amended reply of the plaintiffs was filed, the case was set down for trial on the following Monday. The defendants asked for a continuance upon the ground that they were not ready to make reply to the new matter contained in the amended reply; that by the rules they were entitled to three days in which to file a reply to the plaintiffs' amended reply. The court denied this motion for a continuance. It is true no formal reply was made by the defendants. But the new matter in the amended reply of the plaintiffs was deemed to be controverted, Rem. & Bal. Code, § 297 (P. C. 81 § 283), and was gone into fully at the trial, and clearly no prejudice resulted by reason of no written reply being filed by the defendants.

It is claimed that the affidavit of Mr. Wilson above set out was inadmissible as evidence against the defendants Elmer Wilson and Sadie B. Wilson, because as against them the statements contained in the affidavit were hearsay. Whatever interest Elmer Wilson and Sadie B. Wilson, the children of John E. Wilson and wife, have in the property, comes

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through their deceased mother. If the parents of these children had no interest in the property at the time of the death of Mrs. Wilson, these children certainly have no interest now, because if Mr. and Mrs. Wilson conveyed away the property prior to the death of Mrs. Wilson, the alienation was complete as against their children. The statements contained in the affidavits are statements of Mr. Wilson against interest and were, therefore, clearly admissible under the statute, against all of the defendants. Rem. & Bal. Code, § 1211 (P. C. 81 § 1027); see, also, 20 Cyc. 1247; *Keller v. McConville*, 175 Mich. 479, 141 N. W. 652.

The appellants argue that one who relies upon a lost deed to sustain his title must establish the original existence of the deed, its loss, and the material parts thereof, by convincing evidence, and cite *Scurry v. Seattle*, 56 Wash. 1, 104 Pac. 1129, 134 Am. St. 1092, to the effect that:

"In order to establish a lost instrument on behalf of a party asserting rights under it, the evidence must be clear and positive, and of such a character as to leave no reasonable doubt as to terms and conditions of the instrument."

The appellants are no doubt correct in their statement of the rule; and the rule is fully met by the evidence in this case. The affidavit above quoted contains all the necessary elements to show that a quitclaim deed was executed and delivered to Mr. Yakey; it describes the property; the kind of a deed it was; and the consideration therefor. There was other evidence to the same effect. But this affidavit clearly establishes all the necessary facts. One of the principal questions in the case naturally was whether or not Mr. Wilson knowingly made the statements contained in the affidavit. The evidence is abundant to show that he did, and the court so found. The trial court evidently did not believe that Mr. Yakey agreed to pay \$1,200 for the property when it was not worth the face of the note and mortgage which he held against it at that time.

The evidence shows that, immediately after the execution of the quitclaim deed and ever since up to the time he sold the property to the plaintiffs, Mr. Yakey paid the taxes regularly each year, and that the plaintiffs, after they acquired the title to the property, also paid the taxes; and it is not seriously disputed that Mr. Wilson knew that Mr. Yakey was claiming the ownership of the property. It is conceded that Mr. Wilson made the mortgage hereinabove referred to, and that no part thereof has ever been paid. These circumstances tend very strongly to corroborate the theory of the plaintiffs in the case.

We have carefully read the record and are satisfied that the trial court, upon competent evidence, found correctly from the great preponderance of the evidence that a quitclaim deed was made to the land in question, which was properly acknowledged, the consideration paid, and the deed delivered to Mr. Yakey, and was lost. The evidence is convincing on all these points. We are satisfied that the judgment of the trial court was right. It is therefore affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ.,
concur.

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Statement of Case.

[No. 11928. Department Two. April 14, 1915.]

M. A. DAUGHERTY *et al.*, *Respondents*, v. METROPOLITAN
MOTOR CAR COMPANY *et al.*, *Appellants*.¹

APPEAL AND ERROR—REVIEW—FINDINGS BY COURT. The findings of a trial court, when not supported by a preponderance of the evidence, will be set aside on appeal.

MUNICIPAL CORPORATIONS—INJURIES TO PERSONS ON STREETS—NEGLIGENCE—EVIDENCE. The driver of an automobile colliding with a boy is not shown to be guilty of negligence, when the evidence shows that he was proceeding on a business street at a rate of from six to ten miles per hour, and that the boy, running diagonally across the street, suddenly darted in front of his machine, and that, after striking the boy, he stopped the automobile within a very few feet.

MUNICIPAL CORPORATIONS—STREETS—CONTRIBUTORY NEGLIGENCE. In an action for personal injuries, the negligence of plaintiff was the proximate cause of his injuries, where it appears from the evidence that he was a newsboy fourteen years of age, accustomed to being on the business streets, and had been selling papers for a year at one of the busiest street corners; that on hearing the whistle of the paper distributor, he darted up and ran towards him diagonally across the street, some distance south of the street crossing; that the driver of the automobile was driving slowly with the machine under control, and did not see the boy until he was almost against the machine.

MUNICIPAL CORPORATIONS—INJURIES TO PERSONS ON STREETS—LAST CLEAR CHANCE. The doctrine of last clear chance does not apply in case of a pedestrian run down by an automobile, where the driver did not see the pedestrian until the latter, while running, was about to collide with the machine, and where he did everything that could be done, such as turning to one side, to avoid the accident.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered December 6, 1913, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for personal injuries sustained by a pedestrian struck by an automobile. Reversed.

Douglas, Lane & Douglas, for appellants.

Moore & Sweeney, for respondents.

¹Reported in 147 Pac. 655.

Crow, J.—Action by M. A. Daugherty and Frank Daugherty, by M. A. Daugherty, his guardian, against Metropolitan Motor Car Company, a corporation, and Bruce A. Griggs, to recover damages for personal injuries sustained by Frank Daugherty. From a judgment in plaintiffs' favor, the defendants have appealed.

The cause, which was tried to the court sitting without a jury, is before us for trial *de novo*, and we find it necessary to consider only appellants' contention that the trial judge erred in entering judgment in respondents' favor. The preponderance of the evidence shows that the respondent Frank Daugherty, who sues by his guardian, was on April 29, 1913, about fourteen years of age; that for some years prior thereto he had been engaged in selling newspapers on the streets of Seattle; that for one year he had a news stand at the southwest corner of Marion street and Second avenue; that Marion street runs east and west, while Second avenue runs north and south; that on April 29, 1913, the appellant Bruce A. Griggs, in charge of an automobile owned by the appellant Metropolitan Motor Car Company, was driving south on the west side of Second avenue, traveling six to eight miles per hour; that after he had crossed the intersection of Marion street and Second avenue and was some little distance south of the crossing, the respondent Frank Daugherty suddenly darted from behind his news stand, ran diagonally across Second avenue toward the southeast, collided with appellant's automobile, and was injured. The evidence shows that one George W. Engler, who was distributing afternoon papers to newsboys and news stands, was driving a news cart north on the east side of Second avenue; that he intended to deliver some papers to Frank Daugherty and also present him with a ball which he had earned as a premium; that as he came up the street he blew a whistle to attract the attention of Daugherty, who immediately ran across the street in a diagonal direction to meet him, and collided with appellant's automobile; that the appellant

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Griggs, not seeing him until he was almost against the machine, turned the automobile to the left and stopped it, but was unable to avoid the accident, and that the machine did not travel more than its length after its impact with respondent.

Respondents contend that the appellant Griggs was negligent in driving the automobile carelessly and at a rate of speed in excess of that allowed by the city ordinances. One witness testified that in his opinion appellant was driving about twenty-five miles per hour, but other witnesses fixed his rate of speed approximately at six to ten miles per hour. Had the cause been tried by a jury, and had the jury found appellant was driving at an unlawful rate of speed, the testimony of the single witness above mentioned would be sufficient to sustain the verdict, and we would not be warranted in disturbing that finding. But the action is before us for trial *de novo*, and although we ordinarily adopt the findings of the trial judge, we are not compelled to do so, if we conclude they are not supported by a preponderance of the evidence. Our conclusion is that the appellant was not driving at an excessive or dangerous rate of speed. He stopped the automobile within a very few feet, which he could not have done except when driving slowly with the machine under control.

Appellants contend that the respondent Frank Daugherty was guilty of negligence on his part, and that his negligence was the sole and proximate cause of the accident. The evidence shows that respondent was accustomed to being on the business streets of Seattle selling papers, caring for himself, and looking out for automobiles. He testified on his direct examination, that he had been selling papers at Second avenue and Marion street for about one year; that Mr. Engler whistled for him; that he jumped off the curb and started across the street between a walk and a run, and that the auto struck him, which was all he knew. On cross-examination, he testified that he jumped off the curb and

started diagonally across the street in a sort of a "dog trot," and that he did not look north to see if anything was coming. An approaching auto on his, the west, side of the street would come from the north if traveling in accordance with the law. Other witnesses testified, that he darted from the curb; that, without looking, he ran rapidly across the street in a diagonal direction, and that he collided with the auto. It is conceded that he was not upon a street crossing, where pedestrians have superior rights and are not, as a matter of law, required to exercise as great a degree of care as they are required to exercise at other points. The difference between the relative rights of a pedestrian and those of the driver of an automobile at and between street crossings is clearly defined in *Johnson v. Johnson*, ante p. 18, 147 Pac. 649, wherein we reviewed and commented upon our previous decisions. In that case a pedestrian was injured on a crossing where she had a superior right. In this case respondent was injured while running across the street in a diagonal direction a considerable distance south of the crossing, the distance being anywhere from fifteen to thirty feet. In the *Johnson* case, we said:

"If the conceded right of way means anything at all, it puts the necessity of continuous observation and avoidance of injury upon the driver of the automobile when approaching a crossing just as the necessity of the case puts the same higher degree of care upon the pedestrian at other places than at crossings."

From remarks made by the trial judge, the indications are that he thought the last clear chance doctrine should be applied, and that respondent was entitled to that chance. The facts proven do not justify any application of that doctrine. The evidence indicates that appellant Griggs did not see respondent until he, while running, was about to collide with the machine, and it is clearly proven to our satisfaction that appellant Griggs did everything he could, or that could be

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done by any one, to avoid the accident. We are satisfied that the accident was due solely to respondent's negligence.

The judgment is reversed, and the cause is remanded with instructions to dismiss.

MOUNT, MAIN, and ELLIS, JJ., concur.

[No. 12044. Department Two. April 14, 1915.]

G. E. LOVELL, *Appellant*, v. J. S. HAYE, *Respondent*.¹

SALES—SUFFICIENCY OF EVIDENCE—PROMISE TO PAY. An original promise of defendant to pay for goods sold and delivered to another, his tenant, is sufficiently established where the evidence shows that the tenant was farming certain lands of defendant on an agreement to share the crops; that the tenant was indebted to a storekeeper for groceries and farm implements, and had been refused further credit; that the defendant paid what was due on the groceries, but refused to pay the indebtedness for the machinery, and testified that he said, "I have paid the account as I agreed, now it is up to you, what will you do," and the storekeeper said the tenant could have such further credit as he desired; while on the other hand, the testimony of the storekeeper was that defendant told him to let the tenant have "what he wanted and he would pay him dollar for dollar," and this testimony was corroborated by that of the tenant and by an employee of the storekeeper, and by the further fact that the tenant was already indebted to the amount of his own share in the crop, and it was to defendant's interest to see that he was supplied with goods necessary to carry on harvest operations, so that the defendant would be able to realize his half share in the crops.

FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—ORIGINAL OR COLLATERAL PROMISE—EVIDENCE. A promise to pay the debt of another for goods sold is an original, and not a collateral one, where it was a direct promise to pay the debt "dollar for dollar," without qualification or reservation; and the fact that the goods were not charged to the promisor, but to the original debtor, would not in itself be sufficient to overcome a direct promise.

APPEAL—REVIEW—FINDINGS. Upon trials *de novo* on appeal, the findings of the lower court are not equivalent to the verdict of a jury and thus entitled to stand, if there is evidence to support them, but it is the duty of the supreme court not to follow them when against the weight of the evidence.

¹Reported in 147 Pac. 632.

Appeal from a judgment of the superior court for Spokane county, Sessions, J., entered December 23, 1913, upon findings in favor of the defendant, in an action on contract, tried to the court. Reversed.

Zent, Powell & Redfield and *Lovell & Davis*, for appellant.

Danson, Williams & Danson (*George D. Lantz*, of counsel), for respondent.

FULLERTON, J.—This is an action originally instituted by the trustee in bankruptcy of one W. E. Soden, to recover for certain goods, wares and merchandise alleged to have been sold and delivered to one S. N. Gibson at the request and on the credit of the respondent, J. S. Haye. Issue was taken on the complaint and a trial had, resulting in findings by the court to the effect that the respondent did not agree to pay for the merchandise, but, on the contrary, that the same were sold, delivered and charged to S. N. Gibson on his own credit and responsibility. Judgment was entered on the findings, and subsequent thereto, the trustee in bankruptcy assigned his cause of action to G. E. Lovell, who prosecutes this appeal.

Two principal questions are presented by the record, first whether the respondent, Haye, agreed to pay for the goods sold to Gibson, and second, if he did so promise, was his promise original or collateral. There are certain undisputed facts in the record. During the year 1911, and down to July 20 of the year 1912, W. E. Soden conducted a general merchandise store at Benge, in Adams county, in this state. S. N. Gibson was then the lessee of certain farming lands belonging to the respondent, J. S. Haye, which he was farming for a share of the crops grown thereon. Gibson traded at Soden's store, buying largely upon credit. By the early part of the summer of 1912, Gibson's account had reached a considerable amount and Soden began pressing him for payment. Gibson promised from time to time to have the account taken care of by his landlord, Haye, but

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neglecting so to do, Soden, about June 1, 1912, refused him further credit. On June 5, 1912, Gibson appeared at the store of Soden with the respondent, Haye, when a settlement of the existing account was had and an arrangement made whereby Gibson was allowed by Soden to continue purchasing goods. In this settlement it is conceded that Haye paid to Soden that part of Gibson's account which was incurred for groceries, but refused to pay for certain farm machinery and implements purchased by Gibson and for which he had given notes that had not then matured, and that after this settlement the question of further sales to Gibson was taken up between the parties.

On the disputed questions, Soden testified that the settlement of the account was made between himself and Haye at a place in the store called the balcony, outside of the presence of Gibson; that thereafter Haye and himself went down into the main part of the store, when Haye called Gibson to a desk therein and asked him if he desired to trade further with Soden, saying that he did not have to do so, as he, Haye, would just as soon send him such stuff as he needed down from Spokane as to purchase it of Soden. That Gibson replied by saying that he had always been treated right at Soden's store and would as soon trade there as anywhere; that Haye thereupon turned to the witness and told him to let Gibson "have what he wanted and he would pay him dollar for dollar." Haye denies making in any form a promise to pay for any further goods sold to Gibson. While he admits making the settlement in the manner and at the place stated by Soden, he testified that, after they came down into the main store room, he "called Gibson and said, 'Now, I have paid the account as I agreed, and now its up to you; what will you do?'" and that Soden then spoke up, saying that Gibson could have such further credit as he desired.

Soden's version of the transaction is corroborated by an employee by the name of Hooper, not only as to the direct nature of the promise, but also as to the circumstances under

which it was made. He is also corroborated as to the promise by Gibson, although Gibson purported to give the substance of the conversation rather than the particular language used, and some of his answers indicate that the promise was collateral rather than original. The circumstantial evidence also, we think, supports Soden rather than Haye. As we have said, Gibson was a tenant on Haye's farm land, and was obligated to harvest the crops growing thereon. At the time of this transaction, the harvest season was just beginning, and it was known to all of the parties that Gibson would need various articles of merchandise if he was to carry on successfully the work of harvesting. It was known to Soden as well as Haye that Gibson was not entitled to further credit from a merchant's viewpoint, as he had then assigned to Haye as security for advancements theretofore made, and certain others to be made to him by Haye, all his interest in the crops growing on the leased land, and that his residuary interest therein was of doubtful value. Soden, therefore, had no interest to promote in selling goods to Gibson; on the contrary, he knew that if he did so on Gibson's own credit it must result in an almost certain loss to him. On the other hand, Haye had an interest in seeing that Gibson was supplied with such goods, for otherwise he would not be able to carry on the harvest operations. Under these circumstances we think it much more probable that Haye made the promise to pay for the goods than that Soden sold them on the credit of Gibson.

But it is said that the promise is collateral rather than original, and that no recovery can be had because of the statute of frauds. We are clear, however, that the promise was original rather than collateral under the most exacting of the rules. The version given by the witnesses who repeated the language in which the promise was made, is that it was a direct promise to pay "dollar for dollar," without condition or reservation, and this, as we have heretofore held, is the distinguishing line between an original and a collateral

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promise. *Goldie-Klenert Distributing Co. v. Bothwell*, 67 Wash. 264, 121 Pac. 60, Ann. Cas. 1913 D. 849; *Davies v. Carey*, 72 Wash. 537, 130 Pac. 1137; *Wells & Morris v. Brown*, 67 Wash. 351, 121 Pac. 828, Ann. Cas. 1913 D. 317.

Again, it is said there can be no recovery because the goods were not charged to Hays on the seller's books, but were, on the contrary, charged to Gibson. There are cases which maintain this doctrine, but the better rule and the weight of authority is the other way. No doubt the manner in which the goods are charged on the books of the seller is a circumstance to be considered in determining to whom credit is given, but it is not conclusive. *Mackey v. Smith*, 21 Ore. 598, 28 Pac. 974; *Ridgeway v. Corporation Liquidating Co.*, 71 N. J. L. 676, 62 Atl. 116; *Runkle & Fouse v. Kettering*, 127 Iowa 6, 102 N. W. 142; *Cruse v. Foster & Estes*, 76 Ga. 723; *Kesler v. Cheadle*, 12 Okl. 489, 72 Pac. 367. We are not convinced that the circumstance in this instance is sufficient to overcome the direct evidence.

The respondent further contends that the finding of the lower court on a question of fact is equivalent to the verdict of a jury, and will not be reversed in this court unless the finding is without evidence in its support. We so held in *Second National Bank v. Hatch*, 24 Wash. 421, 64 Pac. 727, but the case was contrary to the provisions of the statute, and was directly overruled in the case of *In re Garfinkle*, 37 Wash. 650, 80 Pac. 188, where it is said that the question had been inadvertently decided. In the late cases of *Johns v. Arizona Fire Ins. Co.*, 76 Wash. 349, 136 Pac. 120, 49 L. R. A. (N. S.) 101; *Baker v. Yakima Valley Canal Co.*, 77 Wash. 70, 137 Pac. 342; and *Johnsen v. Johnsen*, 78 Wash. 423, 139 Pac. 789, 1200, we have reaffirmed the doctrine of the case of *In re Garfinkle*, and sought to make it clear that this court tries *de novo* all actions in equity and all actions at law where the case is tried in the court below without a jury. Unquestionably the judgment of the trial court on the evidence is entitled to

weight, but if we conclude that the weight of the evidence is against the findings, "it becomes our duty to reflect our conclusion in the judgment." *Johnsen v. Johnsen, supra.*

The appellant admits that the claim sued upon is too large by the sum of \$95. We think it too large also by the further sum of \$135, making a total of \$230. These sums were for items sold by Soden to Gibson on Gibson's individual credit, prior to the time Haye entered into the transaction, and in no manner can he be responsible for them.

The judgment is reversed, and remanded with instructions to enter a judgment in favor of the appellant and against the respondent for the sum demanded in the complaint, less \$230.

CROW, MOUNT, MAIN, and ELLIS, JJ., concur.

[No. 12065. Department Two. April 14, 1915.]

VANCOUVER TRUST & SAVINGS BANK, *Respondent*, v.
UNION WOOLEN MILLS, *Appellant*.¹

CORPORATIONS—DEED OF TRUST—FORECLOSURE. Where a corporation in embarrassed circumstances, but still a going concern, issued negotiable bonds for the purpose of selling the same to pay indebtedness and obtain money to continue operations, and to secure same executed a deed of trust of the corporate properties to a trustee for the bondholders, and such trustee, to enable the corporation to meet current necessities pending the sale of the bonds, advanced money to the corporation as a loan on the pledge of the bonds, such trustee as pledgee of the bonds had priority over the general creditors and was entitled to foreclose its pledge.

CORPORATIONS — DEED OF TRUST — BOND ISSUE — ASSIGNMENT FOR BENEFIT OF CREDITORS. The execution of a deed of trust by a corporation to secure its bonds, issued with a view to their sale for the purpose of changing due obligations into time obligations and of raising funds for current expenses, and the assignment of the bonds to the trustee bank, which made advances thereon to meet temporary necessities of the corporation pending the sale of the bonds, the trust deed reciting that the trustee should have no responsibility for

¹Reported in 147 Pac. 643.

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the delivery of any of the bonds, and that it assumed no responsibility other than to hold the deed as trustee for the purchasers of the bonds, did not constitute an assignment for the benefit of creditors nor impose on the trustee the duty of selling the bonds.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered October 9, 1913, upon findings in favor of the plaintiff, in an action to foreclose a pledge, tried to the court. Affirmed.

Reed & Bell, Jas. P. Stapleton, McMaster, Hall & Drowley, and Miller, Crass & Wilkinson, for appellant.

Geo. B. Simpson and H. L. Parcel, for respondent.

FULLERTON, J.—The respondent, the Vancouver Trust & Savings Bank, brought this action against the Union Woolen Mills and its trustee in bankruptcy, W. D. Sappington, to foreclose upon certain bonds claimed by the bank to have been issued by the Union Woolen Mills and pledged to the bank as security for a loan. Issue was taken on the allegations of the complaint and a trial had, which resulted in a decree of foreclosure and order of sale. The trustee in bankruptcy appeals.

The facts are these: The Union Woolen Mills is a corporation organized under the laws of the state of Oregon. Its business was manufacturing woolen goods and fabrics, and for that purpose it had constructed two separate plants, the one located at the town of Union, in the state of Oregon, and the other at the town of Washougal, in the state of Washington. The business of the concern proved not to be prosperous, and it became largely indebted. In the early part of the year 1912, these debts became pressing, and the corporation had difficulty in procuring means necessary to carry on its current business. At this stage of its affairs, the directors of the corporation consulted with its principal creditors as to the best means of relieving the corporation from its financial straits, and it was concluded to issue \$50,000 in 20-year negotiable coupon bonds of the denomina-

tion of \$100 each, secured by a deed of trust upon the corporation's real and personal property. The respondent, Vancouver Trust & Savings Bank, was not at that time a creditor of the corporation, but at the suggestion of one of the principal creditors, it was solicited to become a trustee for the bondholders, and to hold the title to the property for their benefit. The respondent, after investigating the properties of the corporation, consented to act as such trustee, and consented to make an advancement on the security of the bonds in a limited sum and for a limited time to meet the current expenses of the corporation pending the sale of the bonds, such advancement to be repaid when the bonds should be sold. Later, and on March 4, 1912, the board of directors of the corporation duly passed and caused to be spread upon its records a resolution authorizing the issuance of the bonds and deed of trust contemplated, which resolution was submitted to the stockholders of the corporation at their regular annual meeting held upon the same day and by them duly approved.

Pursuant to the resolution, the contemplated bonds were executed payable "to the bearer, or if registered, to the registered holder thereof," together with a deed of trust running to the respondent as trustee, covering the entire property of the corporation. The bonds and deed were delivered to the respondent on March 22, 1912, at which time a written agreement was entered into between the corporation and the bank, reciting the terms and conditions upon which the bonds and deed were to be holden by the bank. Among these conditions was the following: "And the party of the second part [the Vancouver Trust & Savings Bank] agrees to extend a loan of \$7,500 for 90 days to the party of the first part [the Union Woollen Mills] and hold and accept as security therefor the Union Woollen Mills Company's note and \$50,000 of the bonds issued under said mortgage or deed of trust, as aforesaid, which is to be a temporary advancement, pending the sale and delivery of said bonds."

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On the delivery of the bonds and mortgage to it, the bank advanced to the use of the Union Woollen Mills the amount agreed to be so advanced in the written agreement, and shortly thereafter, on the oral agreement that the bonds should stand pledged for the same, made a further advancement of \$1,200.

The board of directors of the mill company undertook to sell the bonds through dealers engaged in that business, but without success, and in fact none of them were ever sold. The business of the company did not subsequently improve, and on October 12, 1912, it was adjudged a bankrupt in the district court of the United States for the district of Oregon. The present action was begun in the month of December following.

If we understand the contentions of the appellant, he claims that the creditors of the corporation were the sole beneficiaries of the deed of trust; that upon the delivery of the deed to the respondent bank, the bank became their trustee, and thereafter neither the corporation nor the bank had authority to dispose of the bonds except by sale directly to some purchaser, and that then the proceeds of such sale must be paid to the bank and applied by it upon the obligations due the creditors. Seemingly, also, it is contended that the bank alone could issue or make delivery of the bonds, and hence any attempt on its part to deliver to itself or retain possession of them in pledge as security for any advancement made by it is void as against the rights of the creditors.

But it is our opinion that the appellant has misconstrued the effect of the deed of trust. The deed is set out in full in the record. Its length prohibits its being reproduced here, but it contains no extraordinary conditions. Its purpose was to secure the payment of the bonds in the hands of those who might become purchasers thereof, and all of its conditions were directed to that end. It contains, it is true, by way of recital, the resolution of the board of directors authorizing the issuance of the bonds. But that resolution,

even were it a material circumstance, does not declare that the sole purpose of the bond issue is to meet the obligations of the corporation. It is one of the purposes, according to the recital in the resolution, but other purposes were for the "development and enlargement of its business, and for all other purposes connected" with such development and enlargement. If, therefore, the recital with respect to the creditors could be held to confer on them some interest in the disposition of the bonds, it could not be a paramount interest, or such an interest as would preclude the corporation from disposing of the bonds for the other purposes recited. Nor is the contention tenable that the bonds were to be delivered to the bank to be issued and sold by it, and not by the directors of the corporation. Such a theory is contrary to the actual purpose and intent of the parties as shown by the extrinsic evidence, and we think contrary to the intent expressed in the deed of trust. By that instrument it is expressly declared that the bank assumed no responsibility whatever other than to hold the instrument as trustee for the purchasers of the bonds. It did not agree to undertake the sale of the bonds, or to assist in their sale. The only agreement it made in this regard was to take the bonds in pledge as security for an advancement to be made, and to surrender them from its lien of pledge in case of their sale and the return to it of the amount of the advancement it made in pursuance of its pledge. The instrument itself provided:

"It is further understood and agreed that all recitals herein contained are made on behalf of the party of the first part, and the party of the second part assumes no responsibility as to the correctness of any statement herein contained; said party of the second part, and its successors shall have no responsibility as to the validity of this deed of trust or mortgage, nor as to the execution or acknowledgment hereof, nor as to the amount or extent of the security afforded by the property conveyed by this deed of trust or mortgage, nor for the delivery of any such bonds, and said trustee shall

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not be in any way liable for the consequence of any breach on the part of the said party of the first part of the covenants herein contained or for any other act or thing hereunder, except for its, his or their own willful neglect or misconduct."

The deed of trust was, therefore, in no sense an assignment for the benefit of creditors. It created no lien upon the property of the corporation in their favor. The scheme as a whole was one commonly adopted by concerns in like circumstances; its purpose was to change its due obligations into time obligations, to procure funds to meet its current necessities, and thereby permit it to continue as a going concern. There is no question that the parties to the transaction acted throughout in the utmost good faith. At the time of the execution of the bonds, the corporation was a going concern, owning property believed to be of a value greatly in excess of its obligations. It was believed by the directors of the corporation and by the officers of the bank that its bonds could be sold. On the faith of this belief the bank consented to act as trustee of the deed of trust, and to advance to the use of the corporation a sum sufficient to meet its immediate necessities and hold the bonds in pledge until their sale and the return of its advancements. It performed its agreement and we can see no reason why the transaction was not legitimate, and why it is not entitled, since the contemplated scheme failed of fruition, to realize upon its securities.

Of the many cases cited by the appellant in support of his contentions but one requires special notice. In the main the cases cited differ so widely in their facts from the facts of the present case as to render them of but little if any assistance as guides to a correct decision of the questions involved. The case excepted is that of *Shaw v. Saranac Horse Nail Co.*, 144 N. Y. 220, 39 N. E. 73, and is noticed because the appellant affirms that it cannot be differentiated in its facts from the present case. In that case it appears that the company

named owed a large amount of debts, and that its board of directors duly resolved to issue coupon bonds secured by mortgage upon its real estate to raise money to pay such debts. The mortgage ran to one Andrew Williams, and the bonds were delivered to him to be negotiated at not less than par with interest. In pursuance of his authority, Williams, in May 1888, sold certain of the bonds, and later on in the same year sold certain others, receiving for each lot sold the full value thereof in accordance with the terms of his trust. Subsequently he pledged others of the bonds to creditors of the company as security for a past indebtedness, receiving no other consideration for the pledge. The company later became insolvent, whereupon the mortgage was foreclosed and the mortgaged property sold, the sale bringing an insufficient sum to redeem the bonds sold in accordance with the trust. In a contest between the respective holders of the bonds over priorities, the court held that all of the actual purchasers stood on an equal footing and that the proceeds of the sale should be divided among them *pro rata*; holding further that the pledgees were not entitled to share in the distribution. This case seems to us to be correctly decided, but in our opinion it is far from sustaining the contention of the appellant in the present case. Here there has been no sale of the bonds, and no question of priority between purchasers and pledgees is presented. The sole question here is, could the company issuing the bonds, and which alone had control over their disposition, pledge them to secure an advancement to the company under an agreement made prior to their issuance. Clearly a decision that actual purchasers of bonds so issued have a priority over pledgees holding them as security for a past indebtedness cannot be authority on such a question. True the court did say in the course of the opinion that Williams' authority was limited to selling the bonds, and that under such an authority he could not pledge them to secure a past indebtedness, but even this does not

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meet the present issue. There was here no such restriction on the company as to the manner of their disposition.

Our conclusion is that the judgment should stand affirmed, and it will be so ordered.

Crow, Ellis, Mount, and MAIN, JJ., concur.

[No. 12398. Department Two. April 14, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. A. C. GUNN,
Appellant.¹

CRIMINAL LAW—EVIDENCE—SIMILAR OFFENSES—ADMISSIBILITY. In a prosecution for larceny based upon the deposit in bank of checks drawn by defendant on another bank in which he had no funds, the defendant assuming to be a man of means and negotiating for the purchase of a majority of the capital stock of the bank in which the fictitious deposit was made, evidence of a prior similar transaction in which the defendant attempted to purchase another bank, but was not able to consummate it on account of his financial inability, was admissible on the grounds of showing intent and as bearing on his inability to deposit funds in the bank on which his checks were drawn before the latter could be presented for payment.

CRIMINAL LAW—RECEPTION OF EVIDENCE—OBJECTION. Where testimony in a criminal prosecution might be admissible for some purpose, error cannot be predicated upon its admission over a general objection which states no grounds therefor, and when no motion was interposed to strike the testimony because not properly connected with the transaction in controversy.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered May 25, 1914, upon a trial and conviction of grand larceny. Affirmed.

Edgar S. Hadley, for appellant.

W. P. Brown and *Loomis Baldrey*, for respondent.

MAIN, J.—The defendant in this case was charged by information with the crime of grand larceny. The charging part of the information is substantially as follows: That

¹Reported in 147 Pac. 401.

the defendant, on or about the 30th day of October, 1913, with intent to defraud, did fraudulently, falsely, dishonestly, and feloniously pretend and represent to the Sumas State Bank, through its officers and employees, that he was a man of wealth and property, and that he had money on deposit in the North Bend State Bank, North Bend, Washington; that he desired to buy the stock of the Sumas State Bank; that he then and there willfully, unlawfully and feloniously deposited with the Sumas State Bank two \$5,000 checks, drawn on the North Bend State Bank by himself, payable to the order of the Sumas State Bank; that he fraudulently and feloniously pretended to the Sumas State Bank that these checks would be honored and paid on presentation; that he represented that he had sufficient money on deposit in the bank upon which the checks were drawn to meet the same; that the officers of the Sumas State Bank, believing the false representations made by the defendant, and relying thereon, and being deceived thereby, were induced by reason thereof to pay certain checks drawn by the defendant on the Sumas State Bank against his \$10,000 credit, in the aggregate sum of \$1,196; that the two checks, aggregating \$10,000, drawn on the North Bend State Bank, were false and fraudulent, and upon presentation to that bank were returned unpaid and marked "no funds;" that at the time the two checks in the aggregate sum of \$10,000 on the North Bend State Bank were drawn, the defendant had overdrawn his account with that bank, and had no balance whatever therein; that by reason of the false and fraudulent representations, and being deceived thereby, the Sumas State Bank accepted the two \$5,000 checks and gave the defendant credit therefor in the sum of \$10,000, and paid out on his checks against this credit the aggregate sum of \$1,196.

To the charge contained in the information, the defendant pleaded not guilty. A trial to the court and a jury resulted in a verdict of guilty. A motion for a new trial being made and overruled, the defendant appeals.

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Upon the trial, evidence was received relative to the attempt on the part of the appellant shortly before the Sumas transaction to purchase a bank at Mt. Vernon, Washington, and that the reason why this latter transaction was not consummated was on account of the financial inability of the appellant. The transaction with the Sumas State Bank involved a purchase of the majority of the capital stock of that bank. Error is sought to be predicated upon the testimony relative to the negotiations for the purchase of the Mt. Vernon bank, and the reason why that transaction was not closed. But this assignment of error is not well founded. The evidence was admissible for two reasons: One, as tending to show intent, and the other, as bearing upon the appellant's inability to deposit sufficient funds in the North Bend State Bank before the checks drawn upon that institution could there be presented for payment.

Another error assigned is, that the court, while the cashier of the North Bend State Bank was testifying, permitted him to answer the question as to the meaning of the term "kiting." To this question an objection was interposed in this form: "I object." The testimony as to this matter when offered would have been competent if the evidence at that time had shown that the appellant had been guilty of kiting; or had it been offered with the statement that later during the trial evidence would be offered that, after the two checks were deposited in the Sumas State Bank, the appellant so manipulated his accounts with that bank and the North Bend Bank as to bring him within the definition of the term. As already stated, the evidence in the record at no point shows that the appellant was kiting the funds from one bank to the other. The testimony not being inadmissible for any purpose, the general objection was not sufficient to base an assignment of error upon for review in the appellate court. The trial court was entitled to know the ground of the objection. If the reason for the objection had been made

known, it may be that it would have been sustained. *Kroenert v. Falk*, 32 Wash. 180, 72 Pac. 1010; *Earles v. Bigelow*, 7 Wash. 581, 35 Pac. 390; 5 Jones, Evidence, p. 368, § 893.

In the absence of an objection stating the grounds thereof, and the failure to interpose a motion to strike the testimony as to kiting because not properly connected with the transaction of the appellant, no error can be predicated upon the admission of that testimony.

It may be said in passing that the attorney who prepared the brief upon appeal and who presented the matter to this court was not the same attorney who appeared for the appellant in the trial court.

While there are other errors assigned, the two which have been considered present the principal questions in the case. The other points urged in the appellant's brief are without substantial merit.

The judgment will be affirmed.

MORRIS, C. J., CROW, FULLERTON, and ELLIS, JJ., concur.

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[No. 12445. Department One. April 16, 1915.]

C. F. SAUNDERS, *Respondent*, v. FIRST NATIONAL BANK OF
KELSO, *Appellant*.¹

MALICIOUS PROSECUTION—MALICE—BURDEN OF PROOF. In an action for damages for malicious prosecution, proof of the discharge of plaintiff by the committing magistrate, is only *prima facie* evidence of want of probable cause, and does not shift the burden of proof as to malice; hence, where the plaintiff fails to establish malice, the defendant is entitled to a directed verdict in his favor.

MALICIOUS PROSECUTION—MALICE—EVIDENCE—SUFFICIENCY. Malice in causing the arrest for grand larceny of one who persisted in attempting to remove mortgaged chattels from the state, after notice by the mortgagee to desist, is not sufficiently shown, in an action for malicious prosecution, by the presumption of want of probable cause from the dismissal of the suit, where the plaintiff testified there was no ill-feeling at the time the notice was given, and the only other evidence of malice was a letter of subsequent date showing some feeling against attorneys for the plaintiff.

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered August 1, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for malicious prosecution. Reversed.

B. L. Hubbell and Miller, Crass & Wilkinson, for appellant.

Imus & Gore and Coy Burnett, for respondent.

PARKER, J.—The plaintiff seeks recovery of damages which he claims resulted to him from the malicious prosecution of a criminal charge made against him by C. C. Bashor acting for the defendant bank. Trial before the court and a jury resulted in verdict and judgment against the defendant, awarding the plaintiff damages in the sum of \$400, from which the defendant has appealed to this court.

The only contention made here by counsel for appellant is that the trial court erred in denying their challenge to the sufficiency of the evidence to support any recovery of

¹Reported in 147 Pac. 894.

damages against appellant, made by motion for a directed verdict at the close of the trial, and by motion notwithstanding the verdict after the return of the verdict and before the rendering of judgment thereon. We therefore notice the facts appearing in the record before us, determinative of this contention.

On November 21, 1913, and for some time prior thereto, C. C. Bashor was the cashier of appellant bank. Appellant then had a chattel mortgage upon a stock of paints and wall paper in a store at Kelso, securing an indebtedness owing to appellant. Respondent was proceeding to remove the stock from the state though warned by Bashor, acting for appellant, not to do so until its debt secured by the mortgage was paid. Respondent was claiming the right to the goods under an execution sale thereof which he claimed was superior to appellant's mortgage which was prior in time. It is plain that Bashor, appellant's cashier, was acting in good faith in claiming appellant's rights under the mortgage. Upon respondent's proceeding to remove the goods from the state, Bashor filed with a justice of the peace, as a committing magistrate, a complaint charging respondent with the crime of grand larceny, and caused his arrest therefor. Upon his arrest he was taken to the office of the justice, where the justice fixed his bail at \$200, and where he was retained in the custody of the sheriff for two or three hours pending arrangements to secure bail, when, upon furnishing the bail, he was released and the hearing before the justice set for a later day. The charge against respondent was thereafter dismissed by the prosecuting attorney. Bashor and respondent were strangers to each other at the time of respondent's taking the goods with a view of removing them from the state.

Aside from the inferences which might be drawn from the mere fact of the charge being made against respondent by Bashor, we have in the evidence only the following which we regard as having any material bearing upon the question of

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Bashor's malice against respondent. Respondent testified in part as follows:

"When I arrived at Kelso I met Mr. C. C. Bashor, as I remember, outside of the bank at Kelso and told him I had come to get the goods, and he said, 'The only way you are going to get those goods is to pay our mortgage.' . . . I wouldn't say he was hostile at all, he merely informed me he would see we didn't take the goods. . . . Cannot recall if ever met Mr. Bashor (C. C. Bashor) prior to conversation with him. No feeling of hostility between us. I think only had one conversation with him."

A day or two following respondent's arrest, Bashor wrote a letter to a firm of attorneys in Portland expressing some feeling against them for the part they were supposed to have taken in the attempted removal of the mortgaged goods from this state. This letter was introduced as tending to show malice on the part of Bashor. It is possible this letter may have some tendency to show ill feeling against those attorneys, but not against respondent. Besides, whatever ill feeling it may possibly tend to show against respondent, it in any event only shows Bashor's attitude after the arrest. In the light of respondent's own evidence above quoted, we think this letter is of no weight touching the question of malice on the part of Bashor at or before respondent's arrest. Plainly Bashor never did anything further in the prosecution of that charge against respondent, the prosecuting attorney having dismissed it without hearing.

While we have held that the discharge by a committing magistrate of a person charged with crime is, *prima facie*, evidence of want of probable cause for the prosecution of such person for the crime charged against him, *Noblett v. Bartsch*, 31 Wash. 24, 71 Pac. 551, 96 Am. St. 996; *Charlton v. Markland*, 36 Wash. 40, 78 Pac. 132, we have also held that such evidence of want of probable cause does not necessarily make a *prima facie* showing of the additional necessary element of malice on the part of the one causing

such prosecution when he is sued and damages claimed from him because thereof. The burden of proof as to the question of malice is not shifted upon the defendant by such proof of want of probable cause. *Ton v. Stetson*, 48 Wash. 471, 86 Pac. 668; *Anderson v. Seattle Lighting Co.*, 71 Wash. 155, 161, 127 Pac. 1108. We think it sufficiently appears from our review of the evidence touching the question of malice on the part of Bashor against respondent when the latter's arrest was caused, that what little evidence there is in this record on that question points affirmatively to the fact that there was no malice on the part of Bashor. This evidence really militates in his favor rather than against him on that question, although the burden of proof as to that question was then upon his opponent.

Attention is called to our decision in *Waring v. Hudspeth*, 75 Wash. 534, 135 Pac. 222. In that case the jury were permitted to infer malice from facts attending the arrest and prosecution. These are stated in the opinion at page 539 as follows:

"In the present case, however, the respondent did not rely alone upon the fact of the dismissal of the charge of grand larceny; but put in evidence all the surrounding facts and circumstances. It appears that, when the complaint was sworn to by the appellant, he therein charged the respondent with the theft of ten cords of wood, two of which he knew were then in his own woodhouse; and with the theft of eight other cords, which was based on no fact other than that he had been informed that the respondent claimed the wood. It would seem obvious from the facts in this case, that the appellant in causing the arrest showed a disregard of the rights of the respondent which was inconsistent either with good faith or with the purpose to further the ends of justice. In such a case, malice may be inferred from the want of probable cause."

In the case before us, we are unable to find any facts disclosed by this record attending the arrest of respondent pointing to malice or wanton disregard of the rights of re-

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spondent. It is conceded that respondent had actually taken possession of and removed a considerable amount of the stock of goods, enough to make the offense grand larceny if, as a matter of law, respondent had been guilty of larceny, and was proceeding to ship them out of the state. We are of the opinion that there was not sufficient evidence of malice on the part of appellant in causing the arrest of respondent to support the verdict and judgment, and that the challenge to the evidence made by counsel for appellant should have been sustained.

The judgment is reversed and the cause dismissed.

MORRIS, C. J., HOLCOMB, MOUNT, and CHADWICK, JJ.,
concur.

[No. 9950. *En Banc*. April 17, 1915.]

C. G. GERLACH, *Appellant*, v. THE CITY OF SPOKANE,
Respondent.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENT DISTRICTS. The fact that a city makes an improvement district including several streets and blocks is not a violation of a charter provision limiting assessment districts to within 150 feet of the side lines of the street improved, where, by a proper system of bookkeeping, property was assessed with reference only to the street lying within 150 feet of the particular lot assessed.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—UNEQUAL ASSESSMENTS. The assessment of lots within an assessment district at the ratio of fifty per cent for the first lot, thirty per cent for the next, and twenty per cent for the succeeding one, does not raise a conclusion of law that the property is not assessed according to relative benefits, since the presumption is that the improvement is a benefit and the assessment fair; and the burden is upon the property owner to establish otherwise.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—ADDITIONAL ASSESSMENTS. The exemption of certain lots within a street assessment district from levy for the building of a drainage system included in the improvement was proper, where the cost of

¹Reported in 147 Pac. 870.

drainage had theretofore been assessed against them, they were not in the same relative situation as the lots assessed, and the improvement was not essential to their use and enjoyment.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered May 1, 1911, in favor of the defendant, confirming an assessment roll for a public improvement, upon appeal from the city council. Modified.

S. P. Domer (*Harris Baldwin*, of counsel), for appellant.

A. M. Craven, *William E. Richardson*, *John E. Orr*, and *Allen & Allen*, for respondent.

ON REHEARING.

CHADWICK, J.—Appellant, upon reargument, has submitted all of the questions raised in the former brief.

We have reexamined the record, reread the original briefs and the former opinion of the court (68 Wash. 589, 124 Pac. 121), and we are satisfied with the rulings therein made. It is, however, most earnestly contended that our decision in this case was in terms violated by our decision in the case of *Cook v. Spokane*, 69 Wash. 526, 125 Pac. 776, and *Pratt v. Spokane*, 69 Wash. 701, 125 Pac. 777. It is said that these decisions are diametrically opposed to our former holding in the case.

It seems to us that counsel has misconceived our former holding. We did not hold that a city could make an assessment district extending beyond the end of a district, or that it could extend more than 150 feet on either side of the street improved. It will be remembered that the district was extended over several blocks in width and a greater number of blocks in length, and while it was apparently a district greater in extent than was authorized by the statute, it was not so in fact; that, by a proper method of bookkeeping, the property was assessed with reference only to the street lying within 150 feet of the particular lot assessed. In other words, we held that it was competent for the city

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council, in the interest of economy, to call for bids covering a whole district, where, if bids had been requested covering the same territory but cut into particular strips of 150 feet in width on each side of the street, the cost would have been greater to the taxpayer; that, so long as the taxpayer was not called upon to pay more than he would have paid if the two strips of 150 feet each had been separately bid upon, he had no just cause of complaint. We held no more than this in the *Cook* and *Pratt* cases. That is to say, under the same law and charter provisions the city council of Spokane could not extend the side lines of an assessment district more than 150 feet beyond the side line of the street improved.

It is contended that the ordinance under which the improvement was made provided that the property should be assessed according to relative benefits; that it was in fact assessed according to what is known as the zone system. We think it does not follow as a conclusion of law that the property is not assessed according to the relative benefits because the first lot is assessed fifty per cent, the next thirty per cent, and the next one twenty per cent.

It was held in *Powell v. Walla Walla*, 64 Wash. 582, 117 Pac. 389, and *Northern Pac. R. Co. v. Seattle*, 46 Wash. 674, 91 Pac. 244, 123 Am. St. 955, 12 L. R. A. (N. S.) 121, that there are certain presumptions attending proceedings of this kind, among them that an improvement is a benefit; second, that the assessment is fair. In our original opinion in this case, we held that the burden was upon the property owner to show that the assessment was greater than the benefit, citing and quoting from *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686, wherein it was said:

"The assessment to be overturned in this proceeding must be void on its face, and it could only be void for the reason here given on the theory that under no conceivable conditions could lots abutting upon an improvement be equally benefited thereby. But so far from this being impossible,

it would seem that it would be found to actually exist in many instances."

Counsel contends, also, that the assessment is void because the levy for the building of the drainage system was not made over all the property included within the street assessment district. The drainage system was to gather the surface waters accumulating upon the pavements within the area included within the improvement district. Certain lots were exempted. If they had not been exempted by the council the property owners might have insisted, by separate proceedings, that they be relieved of the burden of the tax, for the record shows that the cost of drainage had been therefore assessed to these lots; that they were not in the same relative situation, and that the improvement was not essential to their use and enjoyment. The lots could not have been twice assessed because there was no benefit to sustain it. *Seattle Mattress & Upholstery Co. v. Seattle*, 69 Wash. 666, 125 Pac. 1013; *Aumiller v. North Yakima*, 73 Wash. 96, 131 Pac. 470.

The question of the right of the city to fix a minimum wage was decided on rehearing in the case of *Malette v. Spokane*, 77 Wash. 205, 137 Pac. 496, 51 L. R. A. (N. S.) 686, and is not considered or passed upon in this case. In all other things we adhere to our former holding.

MORRIS, C. J., MOUNT, MAIN, PARKER, and ELLIS, JJ., concur.

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Statement of Case.

[No. 12078. Department Two. April 17, 1915.]

PACIFIC COAST CONDENSED MILK COMPANY, *Respondent*, v.
FRYE & COMPANY, *Appellant*.¹

TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—IMITATION. Fraud amounting to unfair competition by the confusion of things used in the label of another which through such other's prior use had come to connote a particular thing, depends upon whether the same would be reasonably calculated to deceive the common or usual purchaser of the given article when exercising ordinary care.

TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—IMITATION—LABELS AND COLORS. Unfair competition in the use of a similar label for a like article of goods, sufficient to warrant injunction, is not shown by the fact that plaintiff for a number of years had on the market a condensed milk known as "Carnation Brand Sterilized Evaporated Milk," and that the defendant later put out an article known as "Wild Rose Brand Sterilized Milk," when the specific points of resemblance in the labels are that both are made of the same colors of red and white in bands of uniform width with their relative positions reversed; that the central group of one consists of a bunch of three carnations and the other of three wild roses, and that there is a resemblance in number, size, arrangement and relative position of the several parts and words and in the colors in which the same are represented, excepting that the title "Carnation" is in script type and that of "Wild Rose" in Roman; since there is no *idem sonans* in the names, and similarity in the color scheme alone is not sufficient to constitute an infringement; especially where there was no evidence that dealers or consumers had been deceived by the similarity in color and design.

TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—IMITATION—DECEPTION OF PUBLIC. Although a label for a competing article of goods may manifest a similarity in color scheme and grouping which might be characterized as ethically questionable, yet where the differences are so prominent as to negative a design to deceive an intending purchaser of ordinary intelligence using reasonable caution, and there is no evidence of a single person having been deceived, the burden being on plaintiff to establish that fact, the use of such label will not be enjoined.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 18, 1913, in favor of

¹Reported in 147 Pac. 865.

the plaintiff, in an action to enjoin the use of a trade label as unfair competition, tried to the court. Reversed.

Higgins & Hughes (Hyman Zettler, of counsel), for appellant.

Peters & Powell, for respondent.

ELLIS, J.—This is an action to enjoin, as unfair competition, the use of a label upon containers of condensed milk. The plaintiff and its predecessors have, for about fifteen years, manufactured and marketed its “Carnation” brand of evaporated milk, using a label of sufficient length and width to practically cover the surface of the can, with equal horizontal bands of red and white, the red above and the white below. In the middle is a group of three carnation flowers, two red, resting on the white background, and one pink, resting on the red background; with the word “Carnation” in prominent cursive script in white on the red background running in a straight line above the flowers, and the word “Brand” immediately under the word “Carnation,” in small green letters. Immediately under the group of carnations, in small red letters, are the words “Sterilized Evaporated,” and in large green letters, the word “Milk,” below which, in small red letters, are the words “An Unsweetened Condensed Milk.” These, as the major characteristics, are placed in the middle of the label, and are flanked on either side by a torch, one-half in red extending into the white band, and the other half in white extending into the red band. On either side, outside of these torches, are groups of printed matter containing a guaranty and directions. Across the top of the label in the red band is a row of white conventional fleur-de-lis, and along the bottom in the white band a similar row in green.

The defendant is a meat packer, and also operates a group of retail markets in the state of Washington where meats and other supplies are sold. For more than eighteen years it has used the name “Wild Rose,” together with a design

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of the rose in one form or another, on various articles as its brand. A few months before the commencement of this action, it determined to enter the competitive field for the selling of evaporated milk, and adopted a label of the same size, shape and color as that of the plaintiff, with the red band below and the white above, thus reversing the plaintiff's color scheme. The defendant's central figure is a cluster of three wild roses, the stems in white and green resting on the red background, the flowers pink, resting upon the white background. Above the group of flowers are the words "Wild Rose," in prominent upright Roman letters, red in color, forming an arch. Immediately beneath it appears the word "Brand" in green letters. Immediately beneath the group of roses and in the red background appears the word "Sterilized" in small white letters, and immediately beneath that, the word "Milk" in prominent white letters. Flanking the entire figure on either side, instead of the plaintiff's torches, appear two upright scepters, one-half in the white background and the other half in the red background. Outside of these, on either side, appears printed matter wholly different from that similarly placed on plaintiff's label. The defendant's label is not bordered with the fleur-de-lis, but along the bottom of the red band it is bordered with alternating long dashes and round white dots, each edged with a crescent of green.

The case was tried on affidavits and certain stipulated facts. The affidavits on behalf of the plaintiff were made by its president and secretary. The gist of that of the president is as follows:

"Condensed milk is for the most part sold through the channels of the grocery trade, wholesale and retail. Prior to engaging in the manufacture of condensed milk I was for many years engaged in the retail and wholesale grocery business, and am familiar with the habits of retail purchasers in the matter of selecting and indicating goods by reference to distinctive labels, and I know how readily confusion and deception in trade may arise from similarity of labels and trade-marks. I have no hesitation in saying that the Wild

Rose label as described in and shown by the exhibit annexed to the complaint herein might readily deceive the average purchaser at retail, and could easily be used by dealers in palming off goods so labeled upon incautious and illiterate buyers as for Carnation Milk. The injury to plaintiff's business is intensified by the reason that defendant's milk is much inferior in quality to plaintiff's product, which inferiority will, to those users not noticing that they are not getting plaintiff's product, result in leading them to think that plaintiff is not maintaining the standard of its product and will cease to buy it."

The affidavit of the secretary was to the effect that he believed the allegations of the complaint to be true.

The affidavits on behalf of the defendant were those of its president, secretary and purchasing agent, to the effect that the name "Wild Rose," with the design of a rose or roses, had been used by the defendant and its predecessor for more than eighteen years, especially on lard of the highest quality; that after careful consideration in seeking for a label which would be appropriate for condensed milk, they found the colors theretofore used by the defendant, red and black, were not suitable for a light product such as milk; that the color combinations most generally used on condensed milk or similar products are white and red or white and blue; that the probably attractive combinations are very few; that it is impossible to secure a trade-mark from either the state or the Federal governments upon any design or combination of colors by reason of their common use; that any attractive design or combination of colors would be certain to present points of great similarity to some other label already in use; that affiants considered red and white more attractive than blue and white, and made their design, therefore, as distinctive and different from the plaintiff's and other manufacturers' using the same combination as ingenuity could accomplish, not with the view to any confusion, but to avoid such confusion, and to make defendant's milk, under its well

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known Wild Rose brand, as distinctively different as possible. There were also affidavits of six managers of the defendant's retail markets in the state of Washington and of fifty-four retail grocers and general merchandise dealers throughout the state located in some twenty different towns and cities, as follows:

"That each of them has been handling 'Wild Rose' milk for periods averaging from one to six months; that they each for a long time past also handled 'Carnation' milk; that not a single one of affiants has ever known of a single instance of a retail purchaser or any one else who was deceived by any similarity in the labels of 'Wild Rose' and 'Carnation' brands or who mistook one for the other, or who was confused into buying or offering to buy one of the brands for the other; that the 'Wild Rose' and 'Carnation' labels are as different as many other styles of labels on independent brands of goods; that retail purchasers habitually distinguish between and call for brands of canned goods they want by name; that in the judgment of affiants there is no likelihood of any retail purchaser's being deceived by the label into purchasing 'Wild Rose' for 'Carnation'."

There is also an affidavit of defendant's secretary that the affidavits above mentioned were those of all the dealers who have handled the Wild Rose brand, except six or eight who were absent from their places of business when called upon or were located at places so remote that they could not be reached at the time of hearing.

The stipulated facts were to the effect that the defendant's Wild Rose label more nearly approached the plaintiff's Carnation label than any label of any other competitor save one which had been abandoned at plaintiff's instance, that defendant's Wild Rose brand contained on the average about five and eight-tenths per cent of butter fat, while the plaintiff's Carnation brand contained not less than seven and eight-tenths per cent of butter fat, and that the Wild Rose milk has usually been sold on the market at a lower price than the Carnation milk.

The court entered a decree enjoining the defendant from using the Wild Rose label or any other label as closely resembling the Carnation label. The defendant appealed.

Irrespective of technical trade-marks, courts have long recognized the right of the first user of a distinctive dress of goods to protection against use by another of a similar dress or name in unfair competition. The basic principle of the doctrine of unfair competition, though variously expressed, is exceedingly simple. It is just this—no dealer or manufacturer has the right by any name, mark, sign, label, dress or other artifice, to represent to the public that the goods sold by him are those manufactured or produced by another, thus passing off his goods for those of such other to the latter's injury. *Rathbone, Sard & Co. v. Champion Steel Range Co.*, 189 Fed. 26; *Coats v. Merrick Thread Co.*, 149 U. S. 562; *Sterling Remedy Co. v. Spermine Medical Co.*, 112 Fed. 1000; *Schmidt v. Brieg*, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790.

Innumerable cases stating this principle in some form might be cited. The whole doctrine rests on the prevention of fraud by the confusion of *things* through use of a label or dress which by another's use has come to connote a *particular thing*. *Perlberg v. Smith*, 70 N. J. Eq. 638, 62 Atl. 442. The difficulty in such cases lies not in determining the governing principle—that is invariable and runs through all of the cases,—but in applying that principle to the facts of a given case. For this purpose an examination of a multitude of decisions leads us to the conclusion that no rule, other than a very broad one, can be stated. A resemblance which would deceive an expert or very cautious purchaser may still give a right of action, but a resemblance which would deceive only an indifferent or careless purchaser gives no right of action. The true rule lies between these extremes, condemning what would be reasonably calculated to deceive the common or usual purchaser of the given article

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when exercising ordinary care. As said in *Allen B. Wrisley Co. v. Iowa Soap Co.*, 122 Fed. 796, 798:

"The line of demarcation between acts indicative of a lawful and of an unlawful intent here runs wide and clear between those which would not and those which would be likely to induce the common purchaser, when exercising ordinary care, to buy the article of the vendor as the product or property of his competitor. The duty is imposed upon every manufacturer or vendor to so distinguish the article he makes or the goods he sells from those of his rival that neither its name nor its dress will probably deceive the public or mislead the common buyer. He is not, however, required to insure to the negligent or the indifferent a knowledge of the manufacture or the ownership of the articles he presents. His competitor has no better right to a monopoly of the trade of the careless and indifferent than he has, and any rule of law which would insure it to either would foster a competition as unfair and unjust as that promoted by the sale of the goods of one manufacturer as those of another. One who so names and dresses his product that a purchaser who exercises ordinary care to ascertain the sources of its manufacture can readily learn that fact by a reasonable examination of the boxes or wrappers that cover it has fairly discharged his duty to the public and to his rivals, and is guiltless of that deceit which is an indispensable element of unfair competition."

Even in trade-mark cases where the fact of infringement is in issue, the same broad rule applies. We find it nowhere better stated than by Mr. Justice Clifford in *McLean v. Fleming*, 96 U. S. 245, 255:

"Colorable imitation, which requires careful inspection to distinguish the spurious trade-mark from the genuine, is sufficient to maintain the issue; but a court of equity will not interfere, when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other. Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right to redress, if he has been guilty of no laches."

See, also, *Coats v. Merrick Thread Co.*, *supra*; *Bulte v. Igleheart Bros.*, 187 Fed. 492; *Hubinger Bros. Co. v. Eddy*, 74 Fed. 551; *American Tobacco Co. v. Globe Tobacco Co.*, 193 Fed. 1015.

An examination of the complaint makes it plain that the gravamen of the charge in this case is an alleged imitative color scheme. It is the one specific feature emphasized throughout. It is averred, in substance, that the appellant, intending to imitate the respondent's label and to take unfair advantage of the wide reputation of respondent's label and product, has used a label of white and red parallel stripes, the red below and the white above, reversing the relative positions of the stripes as used by respondent. The specific points of resemblance are set out as follows:

"(1) In the two bands, one red and the other white, of uniform width, so placed upon containers that the upper half presents one color and the lower half the other color.

"(2) In the number, size, arrangement and relative position of the several parts and words of the central figure and in the colors in which the same are represented.

"(3) In the number of groups or paragraphs of printed matter outside of the central figure and in their position with relation to each other and to the central figure.

"(4) In the use of green lettering upon the white band and white lettering upon the red band."

It is then averred that this resemblance, "and especially the substantial identity in color scheme and arrangement of major characters, causes such confusion as to mislead the ordinary intending purchaser." That the color scheme is the chief offending element is further emphasized in the prayer for an injunction against the use by the appellant of "any label for milk of any kind which bears red and white bands such as shown on the foregoing label." An examination of the two labels makes it evident that if the claim of unfair imitation is sustained at all, it must be almost entirely upon appellant's use of the red and white colors. The names "Wild Rose" and "Carnation" neither sound alike nor look

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alike. In lettering, the two names are wholly dissimilar. Their only common point is that both are names of flowers. This can hardly constitute an actionable resemblance, especially since the appellant had adopted and given a vogue to the Wild Rose as a brand of its own for other goods long prior to the adoption of the name "Carnation" by the respondent's predecessor. The colors of the two groups of flowers are as dissimilar as possible, so long as both are meant to simulate the true colors of the respective flowers. While on each side of the central group on each label is a column of printed information, the wording and the substance of the one is entirely different from that of the other. The most prominent thing in this side matter of appellant's label is the name "Wild Rose Brand Sterilized Milk" and "Frye & Company." In that of respondent's it is respondent's name, "Pacific Coast Condensed Milk Co." The two really distinguishing features, the name of the brand and the name of the owner, neither of which bears the slightest resemblance to that of the respondent, are set out in appellant's label more prominently than anything else. It is not claimed that the words "sterilized milk" are anything more than truly descriptive matter incapable of exclusive appropriation. Similarity in colors and general arrangement are often held material factors in aiding deceit, but in a majority of the adjudicated cases the names used in connection therewith approach an *idem sonans*. *Enoch Morgan's Sons Co. v. Whittier-Coburn Co.*, 118 Fed. 657; *McLean v. Fleming*, *supra*; *Sterling Remedy Co. v. Spermine Medical Co.*, *supra*; *Bauer & Co. v. La Societe Anonyme etc.*, 120 Fed. 74; *Drewery & Son v. Wood*, 127 Fed. 887; *Carbolic Soap Co. v. Thompson*, 25 Fed. 625; *Franck v. Frank Chicory Co.*, 95 Fed. 818; *Von Mumm v. Wittemann*, 85 Fed. 966; *Centauro Co. v. Link*, 62 N. J. Eq. 147, 49 Atl. 828.

Here, however, there is no hint of *idem sonans* in the names. The names being wholly different, sounding differently, and printed prominently in different colors and type, and the

symbols being different with no marked resemblance other than that necessitated by the nature of the flowers, it is manifest that, but for the appellant's use of the red and white bands, no plausible claim of unfair competition could be advanced. But similarity in color alone is not sufficient to constitute an infringement. The primary colors are few, and, as the evidence shows, those suitable for light products, such as milk, are even more limited. To allow them to be appropriated as distinguishing marks would foster monopoly by foreclosing the use by others of any tasty dress. It has frequently been held that as a rule, subject to certain exceptions when used in connection with other characteristics, a color cannot be monopolized to distinguish a product.

"The primary colors, even adding black and white, are but few. If two of these colors can be appropriated for one brand of tipped matches, it will not take long to appropriate the rest. Thus, by appropriating the colors, the manufacture of tipped matches could be monopolized by a few vigilant concerns, without any patent whatever. Indeed, it is customary for a large company like the defendant to issue many brands of matches, with heads of different colors. It is now making tipped matches. If, by appropriating two colors for each brand, it could monopolize them, it would soon take all the colors not in use by the complainant, and thus cover the entire field at once. For these reasons, we think the court below was in error in holding that the complainant had appropriated the colors of red and blue for the head of its tipped matches." *Diamond Match Co. v. Saginaw Match Co.*, 142 Fed. 727.

See, also, *Philadelphia Novelty Mfg. Co. v. Rouss*, 40 Fed. 585; *American Tobacco Co. v. Globe Tobacco Co.*, *supra*; *New Orleans Coffee Co. v. American Coffee Co.*, 124 La. 19, 49 South. 730; *Fleischmann v. Starkey*, 25 Fed. 127; *Davis v. Davis*, 27 Fed. 490; *Newcomer & Lewis v. Scriven Co.*, 168 Fed. 621; *Mumm v. Kirk*, 40 Fed. 589; *Regensburg & Sons v. Juan F. Portuondo Cigar Mfg. Co.*, 142 Fed. 160; *Heinz v. Lutz*, 146 Pa. St. 592, 23 Atl. 314; *Browne*, Trade-marks (2d ed.), §§ 271 and 272.

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The case of *Nokes v. Mueller*, 72 Ill. App. 431, does not hold to the contrary, but merely emphasizes the exception. In that case the corresponding parts of the rival milk wagons were painted in precisely the same colors, and other characteristics, such as a picture of two cows, a running brook and the inscriptions, were substantially the same. Moreover, the evidence there indicated that some persons were actually deceived. Undoubtedly in cases where simulation is not only so plain as to show an indisputable intention to deceive, and is on its face obviously calculated to deceive, injunctions have been and should be issued without evidence of specific instances of actual deception. *Von Mumm v. Frash*, 56 Fed. 880; *R. Heinisch's Sons Co. v. Boker*, 86 Fed. 765; *Lalance & Grosjean Mfg. Co. v. National Enameling & Stamping Co.*, 109 Fed. 317; *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.*, 168 Mass. 154, 46 N. E. 386, 60 Am. St. 377; *Dutton & Co. v. Cupples*, 102 N. Y. Supp. 309; *Boker v. Korkemas*, 122 App. Div. 36, 106 N. Y. Supp. 904; *Drake Medicine Co. v. Glessner*, 68 Ohio St. 337, 67 N. E. 722; *Burnett v. Hahn*, 88 Fed. 694; *Kostering v. Seattle Brewing & Malting Co.*, 116 Fed. 620.

But, again, in most of such cases there is found an *idem sonans* in name, in addition to color and arrangement of parts on the label or a close imitation in other particulars. We have been cited to but one case, where an injunction was granted, in which the color and arrangement of the offending label was not much more imitative than that complained of here, but in that case the color and type of the names "Fairbanks" and "Buffalo" were similar. *Fairbank Co. v. Bell Mfg. Co.*, 77 Fed. 869.

In that case, moreover, there was proof of specific instances of deception. No such evidence is found here. On the contrary, some fifty-four retail dealers who handled both brands of condensed milk made affidavit that they had never known of a single instance of a retail purchaser or any one else being deceived. True, these dealers had only been

handling the Wild Rose brand from one to six months, but it is evident that if purchasers were ever likely to be deceived, it would be at the start rather than later when the new brand had become better known. As said by the supreme court of Pennsylvania in *Heinz v. Lutz*, 146 Pa. St. 592, 23 Atl. 314, 315:

"It is not enough that there may be a possibility of deception. The offending label must be such that it is likely to deceive persons of ordinary intelligence. It is not necessary to show that persons have been deceived, yet the finding of the master that no one has been deceived, although defendant's label has been in use for some time in the same vicinity as that of the plaintiff's is certainly strong evidence in support of defendants' allegation that their label is not likely to deceive."

See, also, *Kann v. Diamond Steel Co.*, 89 Fed. 706.

The same rule also prevails in England: *London General Omnibus Co., Ltd., v. Lavell*, 1 Chan. Div. (1901) 135; *Payton & Co. v. Snelling, Lampard & Co.*, (1901) Appeal Cases, 308. The last case cited involved competitive brands of coffee, one under the name of "Royal Coffee," and the other under the name "Flag Coffee," the latter contained in canisters with labels of colors which it was claimed were calculated to deceive. Lord Mcnaughten said:

"In the next place, it is perfectly clear that no human being has been deceived. There is not a single instance of any person wishing to buy 'Royal Coffee' buying 'Flag Coffee' instead through any mistake of any sort. Mr. Warmington accounted for that by saying, 'Oh, we were bound to institute proceedings at the earliest possible moment;' but if persons come to the court under an apprehension of that sort they are still bound to make out their case. It will not do to say, 'We were frightened by what might happen, and, therefore, you must stop the thing *in limine*.'"

"The third thing which is perfectly clear on the evidence is this: that as regards the plaintiff's goods, if they have acquired a title and denomination in the market, the only title and denomination which they can have acquired is that

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of 'Royal Coffee,' while as regards the defendant's goods, if they have acquired or should acquire a title in the market, it is or will be the title of 'Flag Coffee'."

So here, there is no evidence that a single person has been deceived, and it seems clear that if the appellant's goods are ever to gain a title in the market it must be as "Wild Rose" milk, and it will not and cannot be as "Carnation" milk. While there is in the case before us a manifest similarity in color scheme and grouping which could not be the result of mere coincidence, but evidences a design to imitate and appropriate respondent's taste in dress, which is not to be commended and may be justly characterized as ethically questionable, the differences are so many and so prominent as to negative a design to so imitate as to deceive by confusing identity or origin. The appellant's label could not deceive an intending purchaser of ordinary intelligence using reasonable caution, which is after all, both on reason and authority, the only practical test.

As said in *Perlberg v. Smith, supra*:

"Care must be taken in these cases not to extend the meaning of the word 'unfair' to cover that which may be unethical but is not illegal. It may be unethical for one trader to take advantage of the advertising of his neighbor, but his so doing would in many instances be entirely legal."

And as said in *Allen B. Wisley Co. v. Iowa Soap Co., supra*:

"Deceit is the basis of suits of this character. The intention to palm off one's goods as those of another, and the use of suitable means to effect that intention, are both essential elements of a good cause of action for unfair competition. The intention alone, without the actual or probable use of means calculated 'to convey a false impression to the public mind, . . . and to mislead and deceive the ordinary purchaser,' furnishes no ground for relief, because an intent to injure where no injury is or will be inflicted, causes no legal damage."

The burden of proof was upon the respondent. From an inspection of the labels, we cannot say that that of the appellant is reasonably calculated to deceive. The uncontradicted evidence shows that no one has been deceived.

The judgment is reversed.

FULLERTON, CROW, MOUNT, and MAIN, JJ., concur.

[No. 12210. Department Two. April 17. 1915.]

In re WEST WHEELER STREET.

THE CITY OF SEATTLE, *Appellant*, v. R. V. ANKENY,
Respondent.¹

APPEAL—DECISION — JUDGMENT — CONSTRUCTION. The decision of the supreme court, is to be construed according to its necessary legal effect as applied to the parties, privies and matters before the court, rather than according to its literal terms; and hence recitals on reversal broad enough to include parties to the action not appealing will be restricted in operation to those parties only who appealed.

MUNICIPAL CORPORATIONS—ASSESSMENTS—REVIEW—REVERSAL. Under Rem. & Bal. Code, § 7797, of the statute governing the exercise of the power of eminent domain by cities, which provides that a judgment confirming an assessment roll "shall have the effect of a separate judgment as to each tract or parcel of land or property assessed, and any appeal from such judgment shall not invalidate or delay the judgment except as to the property concerning which the appeal is taken," property owners who fail to appeal from an assessment, or, having appealed, waive their appeal, are not entitled to take advantage of a reversal of the order confirming the assessment roll; since the final judgment of the lower court confirming the assessment is conclusive upon all who are content to accept it, in view of Rem. & Bal. Code, § 7995, which provides that "as to all property to the assessment of which objections are not filed as herein provided, default may be entered and the assessment confirmed by the court."

Appeal from an order of the superior court for King county, Ronald, J., entered July 6, 1914, in favor of the de-

¹Reported in 147 Pac. 873.

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fendant, revising an assessment roll, in pursuance of a mandate of the supreme court on appeal from confirmation of the assessment. Reversed.

James E. Bradford, Howard A. Hanson, and C. B. White,
for appellant.

Hastings & Stedman, Raymond D. Ogden, R. E. Thompson, Jr., and Peters & Powell, for respondents.

ELLIS, J.—This is the second appeal touching a special assessment roll made by the eminent domain commissioners of the city of Seattle. The opinion on the first appeal, *In re West Wheeler Street*, 77 Wash. 3, 137 Pac. 303, presents a full statement as to the physical conditions of the district. It there appears that the district included two physically separate improvements, one consisting of a roadway leading from Fifteenth avenue, west, to Seventeenth avenue, west, located on what is there designated as the “lowlands” and not benefiting the “highlands” on Magnolia Bluff, the other an overhead roadway extending from Fifteenth avenue, west, northwesterly across and above the lowlands and benefiting the highlands only.

It was there found that the cost of the lowland roadway to the extent of about \$30,000, the exact amount now appears to be \$33,554.09, was erroneously assessed to the highlands. All of the highland owners did not appeal from the order confirming the original roll, but only owners the principal of whose assessments amounted to \$18,474.75. They were successful in the former appeal and this court remanded the roll for revision.

After confirmation, the original roll, except as to the specific properties and assessments involved in the former appeal, was certified to the city treasurer for collection, as provided by the statute. Rem. & Bal. Code, § 7798 (P. C. 171 § 91). The city treasurer then fixed and gave notice of the time when such assessments might be paid without interest or penalty, ending June 11, 1913, after which interest and

penalty attached as provided by law. All of the assessments not involved in the original appeal have now been paid, most of them within the time fixed by the treasurer's notice, some after delinquency but before sale, and some by a sale and issuance of certificates of purchase of the property assessed.

Pending the first appeal, certain of the original appellants voluntarily paid the principal sum of their assessments to the treasurer, who marked the same paid upon the assessment roll which was in his possession. In remanding the cause, department two of this court, as then constituted, said in its opinion:

"The judgment of the lower court is therefore reversed, and the cause remanded with instruction to revise the assessment so that the cost of the street which is solely for the benefit of the lowlands shall be assessed thereto and deducted from the assessment upon the highlands and lands not benefited thereby." *In re West Wheeler Street*, 77 Wash. 3, 137 Pac. 303.

Counsel for the city, construing that language under the statute governing such appeals as of necessity applying only to such specific assessments as had been appealed from, and the appeal from which had not been waived by payment in full, prepared an order revising the assessment roll as to such assessments alone. That order was prepared upon the theory that each of the appellants, except such as had waived the appeal by payment, is entitled to a reduction of his specific assessment in the proportion that the total cost of the disputed item, \$33,554.09, bears to the total principal of the assessments levied upon the highlands, \$116,447.65. The former of these amounts is 28.815 per cent of the latter. (These figures are not disputed, hence we assume that they are correct.) The order presented by the city, therefore, reduced each of the specific assessments appealed from in the original roll, excepting those which had been paid pending the appeal, in this 28.815 per cent thereof, by a mere mathematical computation, confirmed the assessments so re-

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duced, but left the original roll undisturbed as to all other assessments, and directed the eminent domain commissioners to reassess the property actually benefited by the improvement to make up the deficiency created by such reduction.

At the hearing when this order was presented, the court, over the objection of the city, permitted property owners who had not appealed from the original judgment confirming the roll, and others who had appealed but had voluntarily paid their assessments according to that roll, to appear by attorney and object to the entry of this order. The court, construing the opinion of this court on the first appeal as a direction to that effect, re-referred the entire roll to the eminent domain commission to recast the same by omitting from the assessment against all of the highlands the amount which should have been assessed against the lowlands alone, which the court apparently found to be \$30,973.10, and assess the same against the lowlands which are solely benefited thereby, and report the amended roll back to the court for further action. The city appeals.

There is but one question presented. Should the decision of this court on the first appeal be construed literally as reversing the entire judgment of confirmation, thus necessitating a recasting of the entire roll, or should it be construed as reversing that judgment only in so far as it related to the properties of the owners who appealed from that judgment?

A judgment of any court only speaks with reference to the parties and their privies. Where its terms are general they will be construed as confined to such parties and privies. 1 Freeman, Judgments (4th ed.), § 155.

"In case of doubt regarding the signification of a judgment, or of any part thereof, the whole record may be examined for the purpose of removing the doubt. One part of the judgment may be modified or explained by another part; and uncertainties in the judgment may become certain under the light cast upon them by the pleadings or other parts of the record. Though the judgment purports to be against the defendants, without naming them, only one of

them will be bound, if it appears from the context that only he was meant, or from the return of the service of process that only he was brought within the jurisdiction of the court." 1 Freeman, Judgments (4th ed.), § 45.

These same rules of construction apply to judgments or orders of this court. In *State ex rel. Wolf v. Moore*, 16 Wash. 350, 47 Pac. 757, a writ of mandate was issued to compel the respondent to proceed with the trial of an action notwithstanding the broad terms of a writ of prohibition which had issued in a prior proceeding at the instance of different parties. This court said:

"While the language of said writ, literally construed, might be interpreted as preventing the respondent from trying this cause, it is evident that it must be construed with reference to the matters in litigation in the mortgage foreclosure suit aforesaid, or that should have been litigated therein between the parties thereto; and the language of the writ must be limited by such matters, for certainly it could have no force as against a person not a party to the record, nor in privity with any party to those proceedings, who is seeking to maintain an independent claim against said lands, for to hold such a party so precluded would be to deprive him of his property without due process of law."

It may be stated generally that an opinion, order or judgment of this court, like that of any other court, will be construed according to its necessary legal effect as applied to the parties and things before the court, and to parties in privity, rather than according to its literal terms.

The statute governing the exercise of the power of eminent domain by cities makes it too clear for argument that the property owners who did not appeal from the original judgment confirming the assessment roll in this case, or who having appealed waived the appeal by voluntarily paying their assessments, cannot receive the benefits of that appeal. The statute, Rem. & Bal. Code, § 7797, declaring the legal effect of the judgment confirming an assessment roll and of an appeal therefrom says:

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"The judgment of the court shall have the effect of a separate judgment as to each tract or parcel of land or other property assessed, and any appeal from such judgment shall not invalidate or delay the judgment except as to the property concerning which the appeal is taken. Such judgment shall be a lien upon the property assessed from the date thereof until payment shall be made."

The next section, § 7798, declares:

"The clerk of the court in which such judgment is rendered shall certify a copy of the assessment-roll and judgment to the treasurer of the city, or if there has been an appeal taken from any part of such judgment, then he shall certify such part of the roll and judgment as is not included in such appeal, and the remainder when final judgment is rendered: *Provided*, That if upon such appeal, the judgments of the superior court shall be affirmed, the assessments on such property as to which appeal has been taken shall bear interest at the same rate and from the same date which other assessments not paid within the time hereafter provided shall bear. Such copy of the assessment-roll shall describe the lots, blocks, tracts, parcels of land or other property assessed, and the respective amounts assessed on each, and shall be sufficient warrant to the city treasurer to collect the assessment therein specified."

Construing this statute, this court has said:

"As the judgment appealed from, in so far as it affects the property of these appellants, must be reversed, a question arises as to what proceedings should be taken looking to a new assessment. Section 27 [Rem. & Bal. Code, § 7795] of the statute provides that, where objections are not filed within the time ordered by the court, 'default may be entered and the assessment confirmed by the court.' A portion of § 30 [Rem. & Bal. Code, § 7797] reads as follows:

"The judgment of the court shall have the effect of a separate judgment as to each tract or parcel of land assessed, and any appeal from such judgment shall not invalidate or delay the judgment except as to the property concerning which the appeal is taken.' Laws 1893, p. 200, § 30.

"From this provision it appears that the action of this court can affect only the property of appellants; and that those property owners who did not appeal cannot share in

the fruits of success with those who bore the burden of the appeal against the illegal assessment." *In re Westlake Avenue*, 40 Wash. 144, 156, 82 Pac. 279.

While we held in *Seattle v. Sylvester-Cowen Inv. Co.*, 55 Wash. 659, 104 Pac. 1121, that, under the statute, the trial court retains jurisdiction until final judgment confirming the roll, and that construing § 7795 (P. C. 171 § 85) in context, the provision that "as to all property to the assessment of which objections are not filed as herein provided, default may be entered and the assessment confirmed by the court," should be construed as directory rather than mandatory, and confers on the trial court a discretion to grant relief to non-contesting property owners, we also clearly confined that power to the trial court on the first hearing, and reaffirmed the rule announced in the *Westlake* case that the action of this court is confined to a review and only affects the property of parties who have appealed. It is there said:

"*In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279, cited in support of the appellant's contention, states that the action of this court only affects the property of the parties who appeal. Obviously so, as the final judgment of the lower court is conclusive upon all who are content to accept it."

This court is not a court of first instance in eminent domain assessment cases, but purely a court of review. We can grant no relief not granted by the trial court in favor of non-contestants or non-appellants. As said above: "The final judgment of the lower court is conclusive upon all who are content to accept it." The statute in direct terms makes it so. The judgment is a "separate judgment as to each tract or parcel of land." The appeal is, therefore, as to each tract of land, in effect a separate appeal. And again, "any appeal from such judgment shall not invalidate or delay the judgment except as to the property concerning which the appeal is taken."

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Construing the language above quoted from the decision of this court on the former appeal with reference to these principles, and especially with reference to the record and the plain mandate of the statute, it is clear that it is in legal effect a reversal of the judgment only as to those properties the owners of which had appealed and could not, and did not, "invalidate or delay" the original judgment as to property concerning which no appeal was taken. Though the language used was unfortunately broad, it cannot, in view of the record and the law, be construed as warranting the construction placed upon it by the trial court.

Reversed and remanded, with direction to enter the order as presented on behalf of the appellant.

MORRIS, C. J., FULLERTON, CROW, and MAIN, JJ., concur.

[No. 12234. Department One. April 17, 1915.]

BURWELL & MORFORD, INCORPORATED, *Respondent*, v.

WILLIAM G. BARNES *et al.*, *Appellants*.¹

APPEAL AND ERROR—QUESTIONS OF FACT—CONCLUSIVENESS. Where the evidence is conflicting, the findings of the lower court ought not to be disturbed on appeal, unless contrary to the preponderance of the evidence.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. A new trial on the ground of newly discovered evidence is properly denied, where the evidence consisted of the testimony of an attorney who had represented defendants in a transaction involving the question of agency in the case and afterwards removed from the city, and which was as much in their power to produce at the time of the trial as it would be in case of a new trial.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 14, 1914, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

¹Reported in 147 Pac. 657.

Preston & Thorgrimson (F. E. Sansom, on the brief), for appellants.

Reeves Aylmore and Kerr & McCord, for respondent.

MORRIS, C. J.—This is one of those cases where the opinion is of no value except to those directly interested, since the only question to be decided is one of fact. Was the appellant acting through an agent?

The facts upon which the decision must rest are somewhat complicated, involving much conflicting testimony. If the testimony of J. A. Wakefield, the alleged agent, is true, there can be no question as to his agency, and the lower court so found. The testimony upon this point is so sharply in conflict that it passes beyond the point of mistake, forgetfulness or inadvertence. Plainly some one has placed the dollar above the truth. Amid such a mass of conflicting statements as this record presents, it is difficult to ascertain the truth, and for this reason the finding of the lower court should not be disturbed, unless we can say, upon the whole case, the preponderance is the other way. We have read not only the abstract, but the entire statement of facts in an endeavor to reach the right conclusion, and having done so, we are not satisfied that the evidence preponderates against the findings. Having reached this conclusion, the findings will be sustained.

Appellants urge that, even if we should find against them on the question of agency, the acts relied upon to sustain the findings in one essential were unauthorized and without ratification. To our mind the question of ratification, insofar as we find it here involved, is clearer and more satisfying in favor of the findings than is the primary one of agency.

A new trial is asked for upon the ground of newly discovered evidence. This evidence is from one of the attorneys who represented appellants at the time of the transaction, but who had removed from Seattle at the time of the trial. We do not think the showing is sufficient. There is no good reason why this attorney's evidence should not have been

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procured at this trial, as it is clear from the complaint that the respondent was relying upon the alleged agency of Wakefield. This issue being tendered, appellants should have met it in the first instance, and cannot now be given a second trial in order to introduce evidence which was clearly within the issues they were called upon to meet at the first trial, and which was as much within their power to produce then as it would be in case of a new trial.

The judgment is affirmed.

MOUNT, PARKER, CHADWICK, and HOLCOMB, JJ., concur.

[No. 12413. Department One. April 17, 1915.]

LOUISA BRIGLIO *et al.*, Respondents, v. HOLT & JEFFERY,
*Appellant.*¹

EXPLOSIVES—INJURIES FROM BLAST—TRIAL—INSTRUCTIONS—INFERENCES—BURDEN OF PROOF. In an action for personal injuries caused by the explosion of a blast, wherein proof of the injury made a *prima facie* case of negligence, instructions to that effect and that the jury should then "determine from the evidence, the burden being upon the defendants, whether or not these defendants in the conduct of their work were careless and negligent in the manner in which they conducted their blasting," without any other charge that the burden of proof was upon the plaintiffs to establish the injury, and elements of her case, constituted prejudicial error; since it inferred that the burden was upon defendants to disprove, by a preponderance of the evidence, all the allegations and proof on the part of plaintiffs.

EXPLOSIVES—BURDEN OF PROOF—RES IPSA LOQUITUR. The presumption of want of due care under the doctrine of *res ipsa loquitur* is applicable to injuries from blasting, and while it places the burden of proof on defendant, such presumption is rebutted when evidence and inferences are shown, not necessarily preponderating against, but merely counterbalancing the inference derived from, the presumption.

TRIAL—INSTRUCTIONS—RES IPSA LOQUITUR—BURDEN OF PROOF. In an action for negligence involving the question of *res ipsa loquitur*,

¹Reported in 147 Pac. 877.

the proper instruction would be that the burden is upon plaintiff to establish all his controverted allegations by a fair preponderance of the evidence; and where a situation necessarily raised an inference of defendant's negligence, the burden then devolves upon defendant to rebut such presumption by evidence of due care and proper precaution.

Appeal from a judgment of the superior court for King county, Smith, J., entered June 16, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries caused by blasting. Reversed.

Preston & Thorgrimson (F. E. Sansom, on the brief), for appellant.

Andrew R. Black and Ralph Simon, for respondents.

HOLCOMB, J.—The judgment here to be reviewed is one awarding damages to the respondents Louisa Briglio, the wife, and Nicola Briglio, her husband, for injuries sustained by Louisa Briglio on June 20, 1913, through being struck with a piece of debris from a blast exploded by appellant's workmen. The case presented by the evidence to the court and jury was this: At the time of the blast, appellant had a contract with the city of Seattle to grade certain streets, and the particular stump the blasting of which caused the injury was in Atlantic street, about 300 feet distant from respondents' dwelling. The negligence charged in the complaint is that defendant carelessly and negligently failed to guard the blast, or to regulate the quantity of dynamite or other high explosives used. At the time of the blast, she was in the garden of their residence and, while she was in a stooping position, heard the blast and, before she could straighten up, something struck her on the back in the region of the kidneys, and knocked her down. The blast was exploded by a couple of laborers, neither of whom testified at the trial. The foreman at the time was some distance away. The evidence as to the quantity of powder used in blasting the stump was vague and uncertain. No warning whatever was given of the blast, and it was exploded in a portion of the city

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where there were residences and business houses. A married daughter of respondents testified that, upon hearing her mother's cries, she ran to her assistance and found that her shirt waist was dirty where it struck. There was evidence that the blast cast dirt upon the roofs of houses to a distance of 425 or 450 feet from the place of the blast. None of the witnesses testified to having seen the particular object which struck the respondent.

Respondents' testimony was to the effect that, at the time of the injuries to Mrs. Broglio, she was a strong, healthy woman, who felt no pains; that she was able to do her housework and keep seven or eight boarders; that, as a result of these injuries, she was confined to her bed for three weeks; that she had pains all over her body; that she still has constant pain and cannot walk any distance. There was testimony on behalf of appellant tending to show that she was shamming. The physician who so testified never taxed her with shamming, and did not recall having said anything to the other doctors who had examined her, to lead them to suppose that he believed the woman was shamming. The respondents originally brought suit against the appellant and the city of Seattle jointly, but before trial the case against the city was dismissed. The jury returned a verdict for \$2,000 against appellant. This the court later, on motion for a new trial, reduced to \$1,250, and upon such remission overruled the motion for a new trial.

There is but one error which we shall notice. The appellant contends that the court erred in instructing the jury that the burden was upon appellant to show due care by a preponderance of the evidence. This involved the giving of two instructions, and the refusal of one, excepted to by appellant.

On the question of burden of proof, the court first instructed the jury that respondents had made a *prima facie* case of negligence on the part of appellant if they had shown injury from the blast set off by appellant. This, appellant

says, so far as it goes, is conceded to be proper, and if it had been followed by proper complementary instructions, appellant should not complain. But such proper complementary instructions not having been given, this was prejudicial error, the effect of which was to throw upon the defendant the burden of sustaining the plaintiff's case.

The instruction on this point reads:

"You will then determine from the evidence, the burden being upon the defendants, whether or not these defendants, Holt & Jeffery, in the conduct of their work were careless and negligent in the manner in which they conducted that blasting. In other words, if they did the blasting in such a way that a reasonably careful and skillful man would not have done it in the way that they did it, and if you find that this plaintiff was injured from some debris, stone, dirt or piece of stump cast from their blasting, you will determine whether or not that is due to the negligent, careless and unskillful way in which the blast was discharged. . . . When we say that the burden of proof is upon one party or the other, we mean that that party has to establish to you by a fair preponderance of the evidence the truth of the allegations made by that party."

The instructions omitted, indicated by the asterisks, and not included in appellant's exceptions, were instructions as to the measure of compensation and damages to be awarded to the respondents, if any. There is no reference or allusion in the court's instructions to the jury as to the burden of proof, other than the direction in the foregoing instruction that the burden of proof is upon the defendant (appellant) to show that it was not careless and negligent in the conduct of its work. There was no instruction by the court that the burden of proof was upon the plaintiff to establish her injury, the extent of the injury, the amount of damage, and her situation and condition at the time and afterwards, by a fair preponderance of the evidence. We have frequently held, in accordance with the overwhelming weight of authority, that an instruction which might be erroneous if standing alone, but when read in the light of all the other instructions

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given by the court to the jury cannot be said to be erroneous and prejudicial, will not be ground for reversal. The instruction here in question stands alone as to the burden of proof, and certainly the burden of proof was upon the respondents to establish the material allegations of their complaint by a fair preponderance of the evidence. As to where the burden was to establish any material facts by a fair preponderance of the evidence as defined by the court, the jury were only informed that:

"You will then determine from the evidence, the burden being upon the defendants, whether or not these defendants, Holt & Jeffery, in the conduct of their work were careless and negligent in the manner in which they conducted their blasting."

This would be a proper instruction if, as said by appellant, it was given with other proper complementary instructions. The jury might well have inferred, and probably did infer, that the burden of proof was upon the appellant to disprove, by a fair preponderance of the evidence, all the allegations and proof on the part of the respondents.

It is true that the evidence here developed a situation upon which the maxim *res ipsa loquitur* applies. Where the circumstances of the occurrence that caused the injury are of a character to give ground for a reasonable inference that, if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened, it is said "*res ipsa loquitur*"—the thing speaks for itself; that is to say, if there is nothing to explain or rebut an inference that arises from the way the thing happened, it may fairly be found to have been occasioned by negligence. *Sweeney v. Erving*, 228 U. S. 233; *Stokes v. Saltonstall*, 13 Pet. 181.

The proposition is that, upon a situation which presents a case for the application of the maxim *res ipsa loquitur*, there is a presumption raised that there was a want of due care and caution, or, in other words, negligence on the part of

the defendant which no one else is in position to explain, the evidence being peculiarly within the knowledge and control of the defendant. This presumption is a rebuttable presumption of evidence and not a conclusive presumption of law. It is necessary that the party against whom this presumption arises rebut it, for it would be paradoxical to say that the plaintiff must explain this apparent negligence when it is beyond the power of the plaintiff to do so. But this presumption is rebutted when evidence and inferences are shown, not necessarily preponderating against the inference derived from the presumption, but sufficient merely to counterbalance it. It is thus said that the burden of proof is upon the defendant in such case to furnish such evidence or explanation. This does not mean, however, that the defendant must furnish preponderating evidence to explain such presumption, but only that it must furnish evidence as to the cause of the apparent negligence and as to the exercise of due care and caution, or plaintiff would be entitled to peremptory instructions to the jury.

Brief statements have been made in decisions of the courts and by the textwriters to the effect that the burden of proof in such case, where the maxim *res ipsa loquitur* applies, is upon the defendant. Thus there is a statement in Bailey, *Onus Probandi*, p. 74, as follows:

"As to injuries caused by blasting, it seems that the maxim, *res ipsa loquitur*, applies, so, at least, as to devolve the burden of proof on the defendant, to show due care and proper precaution."

See, also, 1 Thompson, *Negligence*, p. 113, § 13; *San Juan Light & Transit Co. v. Requena*, 224 U. S. 89; *Abrams v. Seattle*, 60 Wash. 356, 111 Pac. 168, 140 Am. St. 916; *Pate v. Columbia & Puget Sound R. Co.*, 52 Wash. 166, 100 Pac. 324. In the last case, this court, per Rudkin, J., say:

"The law presumes that accidents such as the one complained of are attributable to the negligence of the carrier,

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and the burden of proof is on the carrier to rebut this presumption;”

and *Abrams v. Seattle, supra*, where the court, after informing the jury as to how a presumption of negligence in such a case arises, and that knowledge of the condition is practically limited to the defendant or its servants and is unavailing except through it or them, and that in such case a mere happening of the accident under such circumstances creates the presumption that the defendant was negligent, and in such case “the burden would be shifted to the defendant to show by a fair preponderance of the testimony that it was not guilty of such negligence”—held that such instruction was not improper. An attempt was made to distinguish between the term “burden of proof” and the term “preponderance of the evidence.” But in such a case, what is really meant is simply that the burden of furnishing evidence explaining the apparent negligence, if any explanation is possible, is upon the one to whom it is attributable. The doctrine means that the facts of the occurrence warrant an inference of negligence; not that they compel such an inference. It does not shift the burden of proof, nor does it convert the defendant’s general issue into an affirmative defense. When all the evidence is in, it is for the jury to determine whether the preponderance is with the plaintiff. *Sweeney v. Erving, supra*.

The proper instructions as to the application of the presumption would be thus: The jury should be instructed that the burden of proof is upon the plaintiff to establish all the controverted allegations of his complaint by a fair preponderance of the evidence, and defining preponderance of the evidence; that when a situation is shown which necessarily infers negligence on the part of defendant, or *res ipsa loquitur*, the burden then devolves upon defendant to furnish an explanation or rebuttal of that presumption of negligence, by producing evidence of his due care and proper precaution,

under the circumstances and conditions necessarily within defendant's exclusive control. If then, after considering such explanation, on the whole case and on all the issues as to negligence, injury and damages, the evidence still preponderates in favor of the plaintiff, plaintiff is entitled to recover; otherwise not.

In this case, the instruction complained of as to the burden of proof, standing alone, and the jury not being directed in any form that it was incumbent upon the respondents to establish any of their allegations by a fair preponderance of the evidence, the burden of proof being upon them so to do, it was clearly erroneous and prejudicial.

The judgment is reversed, and the cause remanded for a new trial.

PARKER and MOUNT, JJ., concur.

MORRIS, C. J., and CHADWICK, J., concur in the result.

[No. 12473. Department One. April 17, 1915.]

FLORENCE-RAE COPPER COMPANY, *Appellant*, v.
ROY J. KIMBEL, *Respondent*.¹

MINES AND MINERALS—RELOCATION—NOTICES. Under Rem. & Bal. Code, § 7365, providing that upon "the relocation of forfeited or abandoned quartz or lode claims, . . . a new location monument shall be erected and the location certificate shall state if the whole or any part of the new location is located as abandoned property," the relocation notice posted upon a claim alleged to be forfeited is invalid where it fails to state that it is located in whole or in part upon forfeited or abandoned ground; the term "abandoned" in the latter part of the act being used synonymously and interchangeably with the terms "forfeited or abandoned" as used in the first part of the act; and it is not sufficient that the certificate to be recorded under § 7358 states the fact as to abandonment.

MINES AND MINERALS—ASSESSMENT WORK—RELOCATION—RIGHT TO. A relocation of a group of mining claims, on the theory that they had been abandoned or forfeited because assessment work for

¹Reported in 147 Pac. 881.

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the prior year had not been done on the claims, is invalid, where, prior to the filing of the relocation notice, the original holder had resumed operations by building and improving trails and roads for the better development of the mine, and was furnishing and moving donkey engines and other material for the purpose of facilitating mining operations for which expenditures had been made in excess of the sums required for assessment work on the claims, although said expenses incurred were not within the boundaries of its claims, and would also inure to the benefit of a railroad project in connection with the mines.

MINES AND MINERALS—MINING CLAIMS—FORFEITURE. Under U. S. Rev. Stat., § 2324, providing that, upon failure to do annual assessment work, a mining claim shall be open to relocation, provided the original locators, or successors in interest, have not resumed work upon the claim after failure and before such relocation, a forfeiture does not ensue from the mere failure to comply with the law, but resumption of work at any time prior to the lawful inception of an intervening right would prevent forfeiture, and a forfeiture will not be declared except on clear and convincing proof with every reasonable doubt resolved against a forfeiture.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered April 27, 1914, upon findings in favor of the defendant, dismissing an action for an injunction, tried to the court. Reversed.

Howard Hathaway, E. H. Guie, and Eugene H. Beebe,
for appellant.

Coleman & Fogarty, for respondent.

HOLCOMB, J.—Appellant is a mining corporation claiming the right to possession of eighteen located mining claims in the Sultan Mining District, in Snohomish county, Washington, having acquired same by location and by purchase from other locators during the years 1910 and 1911. The claims have never gone to patent, but are held and operated under the general mining laws of the United States and of this state, requiring annual assessment work to be done on each claim or upon one claim for the entire group. The claims in issue were held and operated as a group. The president and most active stockholder of the appellant was one Nicholas Rude-

beck. The secretary and treasurer was one O. T. Brackett. Other stockholders and employees working for the corporation were E. A. Fengler, William Stotroen, Frank Curtis, and five or six others, all of whom came from Dubuque, Iowa, to assist in the operation of the mine. The claims were in a mountainous region very difficult of access, and one of the most important matters to be considered in connection with their development was that of access and of transportation for their output. A railway company, called the Florence-Rae Railway Company, was therefore projected by some of the stockholders, for the purpose apparently of cooperating with the Florence-Rae Copper Company, to build about twenty-five miles of railway from the town of Startup to the group of claims. Mr. Brackett was also secretary of this company.

On April 4, 1913, the respondent, Kimbel, entered into a contract at Dubuque, Iowa, signed by himself and Mr. Rudebeck, on behalf of the railway company and the copper company, whereby Kimbel agreed to subscribe for stock in both companies and be employed as a laborer for them at the agreed price of fifty cents per hour, out of which his board was to be retained at the rate of one dollar per day, and seventy-five per cent of the remainder of his wages was to be applied upon the purchase of stock of the par value of the stock in each of the companies, to wit, Florence-Rae Copper Company, the Florence-Rae Railway Company, and another company which seems to have been projected called the Florence-Rae Lumber & Development Company. On June 23, 1913, respondent arrived at Startup, Washington, and about two days later he went to the group of mining claims and there went to work, under the direction of E. A. Fengler, in assisting to move and place two donkey engines. On July 14, 1913, the respondent posted notices of location upon eleven mining location claims, all of which were over eleven claims of the appellant. The appellant was informed of this on about July 21, 1913. The appellant thereupon ordered

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him off the claims as a trespasser. Shortly afterwards he brought an engineer upon the claims for the purpose of surveying and staking the same. Thereupon he was arrested at the instance of appellant upon a criminal charge of trespass, which prosecution was afterwards dismissed, and simultaneously with the dismissal thereof this action was brought by appellant to restrain respondent from trespassing upon said claims and from interfering with the possession and operation thereof. An emergency restraining order was granted, which remained in force during the pendency of the action and until dismissed with the dismissal of the action by the court below in April, 1914.

The respondent answered appellant's complaint, denying trespass, denying the commission of any unlawful acts by him, and setting up two affirmative defenses, in the first of which he alleged that the appellant had failed to perform the assessment work required by the laws of Washington and of the United States, upon the mining claims described and mentioned in appellant's complaint, for the years 1911 and 1912, and that on the 14th day of July he entered upon said claims and relocated the same; that he was prevented from perfecting his locations by the arrest heretofore mentioned, and by the restraining order preventing him from going upon the same. He alleged, as a second affirmative defense, that the boundaries of the mining claims mentioned and described in appellant's complaint were never properly staked or marked upon the ground by appellant prior to the 5th day of August, 1913, and that prior to said date it was impossible for any person to tell from any marks placed upon the grounds what property was intended by the appellant to be included within the boundaries of said mining claims. Wherefore respondent prayed that the action be dismissed and that he be adjudged the owner of said mining claims. The new matter set forth in the affirmative defenses was denied by the appellant's reply. Trial was had before the court in November, 1913.

At the trial the appellant introduced evidence of its incorporation and license for the current year, and its notices of location of the mines in question. It also introduced evidence of the interference with its possession by respondent on July 21, 1913, and on July 25, 1913. The appellant then rested, and respondent moved for a nonsuit, which was denied. Respondent then introduced testimony tending to show, that the assessment work that should have been done by the appellant upon the group of mining claims in 1912 had not been done; that work of the value of not to exceed \$550 only had been done upon all of said claims. He also introduced evidence, over the objection of appellant, to the effect that appellant had not marked the boundaries of its claims upon the ground as required by law; but the court, at the instance of the appellant, required the respondent to elect as between its first and second affirmative defenses, upon the ground that the second affirmative defense was inconsistent with the first, inasmuch as an attempt to relocate mining claims on the ground of abandonment or forfeiture necessarily recognized the fact that there had been a previous valid location and that the attempt to prove that the appellant had not properly located its claims and did not have valid locations to sustain its possessory right was inconsistent therewith. To this requirement to elect, respondent objected and excepted, and elected to stand upon his first affirmative defense—that the assessment work had not been done by appellant and that the claims were forfeited and subject to relocation. The respondent also introduced evidence of his location notices upon eleven mining claims conflicting with eleven of appellant's claims. He, assisted by Fengler, Curtis, and Stotroen, relocated the eleven claims in one day. All of respondent's locations were named Iowa Lode No. 1, and so on to Iowa Lode No. 11, inclusive.

In rebuttal appellant attempted to show, by the respondent and other witnesses, that the respondent located these claims fraudulently and under a fraudulent agreement and collusion

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with Fengler, Curtis, and others who were stockholders in the Florence-Rae Copper Company. This respondent denied, and he testified that he relocated the claims for himself. In rebuttal, also, the appellant introduced evidence to show that all its claims were marked upon the ground by monuments, and by marking the boundaries as well as the nature of the surface would permit. It also introduced evidence to show that, on May 26, 1913, it had resumed its assessment work by the purchase of donkey engines, and by commencing to move them to the mining locations or their vicinity for the purpose of operating an aerial tram and other conveyances for the removal of ore from the mines, and material and supplies to the mines, and that in connection therewith the appellant caused a large amount of work to be done in building trails and improving roads and trails for ingress and egress to and from the mining locations; that said work was continuous up to the time of the attempted relocation by respondent, and that, in addition thereto, and on the 21st day of July, 1913, the appellant caused actual work to be begun upon certain of the mining claims. Appellant, also in rebuttal, introduced evidence to show that its assessment work for the year 1912 had been wholly done by the labor upon building trails, bridge building, grading, slashing, building cabins and repairing a cabin that was upon the group, and furnishing material for the development of the mine, aggregating the sum of \$2,800, or about \$1,000 in excess of what was required to do the assessment work for the entire group for one year.

The court found, among other things, that the appellant failed to perform the necessary assessment work upon said group of claims for the year 1912; that the fair and reasonable value of all the work so performed was and is the sum of \$1,000, and no more; that said mining claims, by reason of the failure to perform said necessary assessment work, became subject to relocation on the 1st day of January next following, to wit, 1913; that on July 14, 1913, while said lo-

cations were subject to relocation and before the plaintiff had resumed work on said claims, and while said claims were vacant and unoccupied and not in the possession of any person whatsoever, the defendant peaceably entered thereon and posted at the point of discovery notices of location as hereinbefore mentioned; that the respondent was, on said 14th day of July, 1913, a native-born citizen of the United States and over the age of twenty-one years; from which the court concluded that the action should be dismissed at plaintiff's cost. A decree in accordance therewith was thereupon entered.

The contentions of appellant are as follows: (1) That there never was a valid relocation of the claims by respondent; (2) that, even if the assessment work had not been performed in 1912, there was a resumption of work by appellant in May, 1913, which resumed work continued from that date until after the alleged relocation by respondent in July; (3) that the alleged relocation was made by respondent in collusion with E. A. Fengler, a manager and stockholder of the appellant company, and F. M. Curtis, another stockholder of the appellant, in order to defeat the title of the corporation to its mining claims, and to secure to themselves advantages flowing from a breach of their trust obligations to the corporation and other stockholders; (4) that the assessment work for the year 1912 had been fully performed by the appellant.

I. We are inclined to think that the first contention of appellant, that the relocation notice was not sufficient, is ruled by the case of *National Milling & Mining Co. v. Piccolo*, 54 Wash. 617, 104 Pac. 128. The statute, Rem. & Bal. Code, § 7365, is as follows:

"The relocation of forfeited or abandoned quartz or lode claims shall only be made by sinking a new discovery shaft and finding new boundaries in the same manner and to the same extent as is required in making a new location, or the relocater may sink the original discovery shaft ten feet deeper than it was at the date of the commencement of such relocation, and shall erect new, or make the old monuments the

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same as originally required; in either case a new location monument shall be erected and the location certificate shall state if the whole or any part of the new location is located as abandoned property."

That portion of the statute referring to the sinking of the shaft does not apply to mining claims west of the summit of the Cascade Mountains, under a further provision of the act. The location certificates of respondent do not state that the claims were relocated as forfeited or abandoned property. The conclusion of the lower court was that, inasmuch as the word "forfeited" is not contained in that part of the statute reciting that the location certificate shall state whether the whole or any part of the new location is located as "abandoned property," the act applies only to abandoned property, and does not require a relocater to state in the *posted notice* that he relocated the mining property as *forfeited claims*. It seems plain to us, however, that the words "abandoned" and "forfeited" in the act are used synonymously and interchangeably, and that the word "abandoned," in the latter part of the act, includes or means in the alternative "forfeited" as used in the first part of the act. This was the construction given to an almost identical act by the supreme court of Arizona upon an Arizona statute, and approved by the supreme court of the United States in *Clason v. Matko*, 223 U. S. 646. In *National Milling & Mining Co. v. Piccolo*, *supra*, this court said:

"The appellant, it will be remembered, was attempting to relocate a forfeited claim, not a claim upon vacant mineral land of the United States. To do this, under this provision of the statute, it was necessary . . . that he state in his location certificate 'if the whole or any part of the new location is located or [as] abandoned [or forfeited] property.' A mere marking of the ground, and posting notices proper for an original location, was not sufficient. A relocation of a forfeited claim must comply with this section of the statute to be valid."

The respondent argues that the location certificate mentioned in this section means the notice or certificate which is recorded with the county auditor under the provisions of Rem. & Bal. Code, § 7358 (P. C. 345 § 15), and that the only things necessary to be stated in the posted notice are the name of the locator or locators, the date of the discovery, and the name of the lode or claim. Those are the requirements specifically mentioned in § 7359 (P. C. 345 § 17) of the code for an original or new location. Under Rem. & Bal. Code, § 7358 (P. C. 345 § 15), the notice to be recorded within ninety days after the discovery and posting of the original notice must contain the name or names of the locator, the date of the location, the number of feet in length claimed on each side of the discovery, the general course of the lode, and such a description of the claim or claims, located by reference to some natural object or permanent monument, as will identify the claim; and respondent contends that, in case of a relocation, the location certificate (to be recorded) must contain one other requisite, which is that it must state if the whole or any part of the new location is located as abandoned property. There is just as much question under this section providing for a relocation of mining claims as to whether any notice or certificate is required to be recorded at all, as there is as to whether the notice or certificate must state whether it is located as abandoned or forfeited property. We assume, however, that a notice or certificate should be recorded to comply with the law. These statutes for local regulation of location of mining claims and protecting the possession thereof are statutes of peace and repose, intended to prevent disorder in claiming and holding mining claims. The disposition of the mining ground itself is wholly within control of the Federal government.

It will be observed that the statute for relocation of mining claims specifically provides that a new location monument shall be located, and the location certificate shall state if the whole or any part of the new location is located as abandoned

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property. We certainly think that this means exactly what it says—that a new location monument shall bear the relocater's notice that he has relocated the original location in whole or in part as abandoned or forfeited property. We are strengthened in this conclusion by the consideration that the original notice of the locator or relocater is that which initiates his right to the possession of a mining claim. His possession is protected from the time of his original notice if upon vacant and unoccupied mining ground, and that of a relocater from the time of posting his relocation notice if the relocation is valid. The ground itself usually bears evidence of having been previously located as a mining claim. The relocater ordinarily knows that he is not the original discoverer and locator, as respondent necessarily did in this case. The original location, however, must be protected so long as the original locator is in possession or has complied with the law, and has not manifestly abandoned or forfeited the location. Lindley, Mines (3d ed.), § 408. When, therefore, the statute says that the location certificate shall contain a statement as to whether it is located in whole or in part upon forfeited or abandoned ground, we think that it obviously and necessarily refers to the notice to be posted upon the ground. The relocation notices of the respondent were therefore insufficient, and were invalid under the statute.

II. There is a further and substantial reason why, in our opinion, the attempted relocation by the respondent was invalid, and that is that the appellant had resumed work in good faith and expended large sums of money for the purpose of developing the mine after the first of January, 1913, regardless of whether or not the previous year's assessment work had been fully done. The evidence is abundant and, we think, overwhelming to the effect that the donkey engines, wire cable, and all the labor used in moving and installing the same, were intended specifically for the development and operation of the mines and not of the railway. It is true that they were to be secondarily used for the purpose of aiding in

constructing the railway, but the railway itself was intended to be an aid and cooperator with the mine. The lower court seems to have taken the view that, because these expenditures were partly for the railway company ultimately, they did not constitute assessment work, and that actual work upon the mining claims themselves by the appellant's employees was not started until July 21, 1913, or after the respondent's initiatory right was secured by posting the notices of relocation. The trial court's finding that the appellant had not resumed assessment work on the group of claims prior to the relocation by the respondent was undoubtedly based upon this theory. We are satisfied it was erroneous. The burden of proving a forfeiture was upon respondent. 27 Cyc. 601.

The evidence is almost uncontroverted that several thousand dollars had been expended in furnishing and moving the engines and other material and in building and improving trails and roads for the better development of the mine, commencing about May 26, 1913, and continuing without interruption until the time at which respondent attempted to relocate said claims. The evidence is overwhelming that the appellant had no intention whatever of abandoning the mining claims or any of them, but on the contrary was spending large sums of money for labor and materials to develop them. The respondent himself was employed by the appellant in laboring for a time to that very end. The respondent could not claim, with any show of good faith whatever, that he believed appellant had abandoned, or was intending to abandon, any of said claims. He testified that he relocated the claims in question for the reason, as he said, that he had been informed by Mr. Curtis, another of the employees and a stockholder of the appellant, that appellant had not done the larger part of the assessment work for 1912. He knew the precise situation and boundaries of appellant's claims. The penalty for failure to comply with the requirements of the law in respect to performance of annual labor is that the location shall be

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open to relocation in the same manner as if no location had ever been made. U. S. Rev. Stats., § 2324.

The term "forfeiture" does not appear in the statute, but the courts employ it as a comprehensive word indicating a legal result flowing from a breach of condition subsequent, subject to which the locator acquires his title. The courts do not incline to the enforcement of this class of penalties, which have always been deemed in law odious. Lindley, *Mines* (3d ed.), § 645; *National Milling & Mining Co. v. Piccolo*, *supra*; *Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036. The Federal statute also provides that:

"Upon a failure to comply with these conditions [assessment work] the claim or mine upon which such failure occurs shall be open to relocation in the same manner as if no location of the same had ever been made; *provided*, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." U. S. Rev. Stats., § 2324.

A forfeiture does not ensue from the mere failure to comply with the law. It requires the intervention of a third party and a relocation of the ground before any forfeiture can arise. When thereby such forfeiture becomes effectual, the estate of the original locator is hopelessly lost, and there is no possibility of its being restored. Lindley, *Mines* (3d ed.), § 651. Resumption of work at any time prior to the lawful inception of an intervening right prevents forfeiture. *Belk v. Meagher*, 104 U. S. 279.

One seeking to avail himself of the failure of a preceding locator to comply with the law, in order to secure a relocation of a mine, must establish such failure by clear and convincing proof, and the court will construe a mining regulation or custom so as to defeat a forfeiture if it can, and every reasonable doubt will be resolved in favor of the validity of the mining claim as against the assertion of a forfeiture. 27 Cyc. 600; Lindley, *Mines* (3d ed.), §§ 651, 654; *Whalen Consol. Copper Min. Co. v. Whalen*, 127 Fed. 611; *McCulloch*

v. Murphy, 125 Fed. 147. The expense of getting the machinery to the mine which, when used, would tend to the development of the mining claims, will be allowed on the annual assessment work on the claims, although said machinery and expenses incurred are not within the boundaries of the claims. *Battersby v. Abbott*, 9 Cal. 568.

All the work done by the stockholder Fengler and his associates and the employees under him, in moving the engines and cable and building and repairing roads and trails, was done for the copper company, according to Fengler's own testimony, and his solemn declaration by way of lien claim against the Florence-Rae Copper Company's mineral claims. All work done for the railway company was excluded from this lien. A sum largely in excess of \$2,000 was spent for labor alone for the benefit of the appellant's mineral claims, commencing in May, 1913. We are convinced that this constitutes such a resumption of work in good faith before the alleged relocation that it defeats respondent's attempted relocation. There is some suggestion in the record on the part of respondent that this is a question of fact on which there is a conflict of testimony, and which the trial court decided on the facts. But as we have said before, we do not consider that there is any conflict of evidence worthy of note upon this question. It is true that secretary Brackett testified that the cost of the donkey engines was charged by him upon the railway company's account. But that does not in any way controvert the fact, established by other witnesses of both the respondent and the appellant, that they were purchased, and the labor in moving and installing them, and other materials and labor, were furnished, for the purpose of improving and facilitating the development of the mines.

The decree of the lower court will therefore be reversed, and the cause remanded with instructions to grant the relief prayed for by appellant.

MORRIS, C. J., MOUNT, PARKER, and CHADWICK, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 12579. Department One. April 17, 1915.]

SIMON KREIELSHEIMER *et al.*, *Appellants*, v. H. C. GILL,
Executor, etc., Respondent, CHARLES BERRYMAN,
Defendant.¹

LIMITATION OF ACTIONS—CONSTRUCTION—ESTOPPEL. Debtors primarily liable on an account, which they induced the creditor to assign to their agent for collection for the purpose of suing one secondarily liable thereon for the benefit of the creditor as well as themselves, are estopped to invoke the statute of limitations in an action against them by the creditor, where the original debtors had promised to pay as soon as suit against the secondary debtors was over regardless of the outcome, and thereby induced the creditor to delay enforcement of his claim, and thus wrongfully obtained an advantage which equity will not allow them to hold; especially where the suit against the party secondarily liable was undetermined and not subject to the plea of the statute.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered November 25, 1914, upon findings in favor of the defendant, in an action upon a rejected claim against an estate, after a trial to the court. Reversed.

Jay C. Allen, for appellants.

Gill, Hoyt & Frye, for respondent.

CHADWICK, J.—The trial judge found the following facts: In July, 1909, Berryman & Pinschower were indebted to the appellants in the sum of \$471.17. They sold their business to Peyser and Bethel. As a part of the purchase price, Peyser and Bethel agreed to pay some debts of the firm of Berryman & Pinschower, including the debt due appellants. Peyser and Bethel did not meet these payments, and Berryman & Pinschower then requested appellants to assign their claim against Berryman & Pinschower to one Welch for the purpose of bringing a suit to recover the amount due them and the amount assumed by Peyser and Bethel. When so

¹Reported in 147 Pac. 871.

requested, appellants told Pinschower that he, being well-to-do and having ample means with which to pay the claim, should pay it; that appellants would then make an assignment to any one whom he might name. Pinschower said that he hesitated to pay the claim for fear that such payment might affect the rights of Berryman & Pinschower in the suit to be brought against Peyser and Bethel, and further represented that he had been a good customer; that if appellants assigned the claim to Welch, Berryman & Pinschower would pay the claim as soon as the suit with Peyser and Bethel was over, regardless of the outcome of the suit; that appellants would not lose anything by so doing and that he would pay the claim upon the termination of the Peyser suit, whether Berryman & Pinschower succeeded or not.

The claim was accordingly, in July, 1909, assigned to Welch and delivered to the attorneys for Berryman & Pinschower. Suit was instituted in the name of Welch against Peyser and Bethel. Appellants were informed from time to time that the suit was being pressed and would be concluded as rapidly as possible. The suit is still undetermined, so far as the record in this case shows. In October, 1912, Pinschower died. Within one year after his death appellants presented their claim to the executor of his last will and testament. The claim was by him rejected.

During all of the time between July, 1909, and October 14, 1912, Pinschower was possessed of considerable property, and if it had not been for his representations the appellants would have insisted upon payment of their claim prior to his death. Upon this state of facts, it was held that the statute of limitations had run against the appellants prior to the death of Pinschower.

The court seems to have made this finding under the well settled doctrine that where a party does no more than to promise a creditor that he will pay the debt, or that he intends to pay the debt as soon as a third party pays him, or will pay when the money is realized from some independent

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source, the statute will nevertheless run and its sanctuary be open to the debtor, notwithstanding the creditor has been led by his personal confidence in the debtor to allow the time for beginning an action to lapse. The rule rests upon the theory that a statute of limitation is a statute of repose, and that a promise must be based upon some new consideration moving to the debtor or that it must be in writing. Rem. & Bal. Code, § 179 (P. C. 81 § 7).

It seems to us that the court did not give due consideration to the distinguishing facts in this case. Berryman & Pinschower were primarily liable to pay the debt. For their own use and benefit and that they might be aided in the collection of that which Peyser and Bethel were owing to them, they induced appellants to assign the claim which their creditors held against them to a third party. The third party was their agent, and the claim was assigned upon the theory and with the intent that he would bring a suit in the name of Berryman & Pinschower for the benefit of appellants, as well as for the benefit of Berryman & Pinschower. The account was, by the act and solicitation of Berryman & Pinschower, put beyond the control of the creditor for the time being. The suit is still pending.

One who is primarily liable should not be heard to plead the statute of limitations while for his own benefit he has the claim in his or his agent's hands for collection from a party who is secondarily liable. The relations of the parties under such a state of facts become subject to equitable principles. Estoppel rests in equity. Respondents cannot plead the statute for the reason that, as between appellants and Berryman & Pinschower acting as agent for appellants, Berryman & Pinschower are still bound and will be bound to the payment of the debt if collected, although the statute may have in time run between the principal parties.

That a debtor may be estopped to plead the statute of limitations is well settled.

"The doctrine of equitable estoppel may in a proper case be invoked to prevent defendant from relying upon the statute of limitations, it being laid down as a general principle that when a defendant electing to set up the statute of limitations previously by deception or any violation of duty toward plaintiff, has caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which equity will not allow him to hold." 25 Cyc. 1016.

The rule rests upon a very elementary principle.

"Where a benefit results to the promisor, or to another at his request, or where any losses or inconvenience is sustained by the promisee at the instance of the promisor, the latter is bound to perform the agreement whether the consideration is sufficient or not, if the contract be otherwise free from illegality." *Newton v. Carson*, 80 Ky. 309.

Furthermore, it will be presumed as between the parties that Berryman & Pinschower, who had assumed for their own benefit to collect from the second debtor, will in time collect the money that is due them from the second debtor, in law, and to appellants in equity, and so long as that debt is not subject to a plea of the statute by the second debtor and the suit is pending, respondents will not be heard to plead the statute in bar of the debt of his testator. His liability does not depend upon a new promise, but because equity will not allow a plea in bar of the old promise. We are clearly of opinion that the facts in this case exempt appellants' claim from the general rule.

The judgment of the court in favor of the respondent should be reversed, and a judgment entered upon the facts found in favor of appellants.

MORRIS, C. J., HOLCOMB, PARKER, and MOUNT, JJ., concur.

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Opinion Per MAIN, J.

[No. 12282. Department Two. April 20, 1915.]

E. P. COLEMAN, *Respondent*, v. CARSTENS PACKING
COMPANY, *Appellant*.¹

ANIMALS—PASTURAGE—ACTION ON CONTRACT—COMPLAINT. A complaint states a cause of action for breach of contract to furnish sheep for pasturage, and not a cause of action for the sale of wheat, where it alleges that plaintiff in the month of July sold to the defendant the exclusive right of pasturing two thousand or more head of sheep upon the standing wheat on a certain section of land owned by plaintiff; that defendant agreed to immediately provide the sheep and pasture them until the wheat was fully consumed and pay therefor one-half cent per head of sheep per day; that the wheat was then in good condition for grazing and would have furnished pasturage for 2,000 sheep for ninety days; that defendant failed to furnish or pasture sheep upon the wheat until about four months later, when it grazed about 3,000 head of sheep upon the land for about one week's time, and that by reason thereof, plaintiff had been damaged in the sum of \$900.

APPEAL—REVIEW—VERDICT. Where the evidence of opposing litigants supports the material allegations of their respective pleadings, the verdict will not be reviewed on appeal.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 7, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

C. F. Wilt, Frank H. Kelley, and Ralph Woods, for appellant.

J. D. Bauer, for respondent.

MAIN, J.—The complaint in this case, aside from the formal parts, alleges: That on or about July 31, 1912, the plaintiff sold to the defendant the exclusive right of pasturing two thousand or more head of sheep upon all the standing wheat then upon one certain section of land in Grant county, Washington, owned by the plaintiff; that it was agreed that the defendant should immediately provide the sheep and pas-

¹Reported in 147 Pac. 893.

ture them until the wheat was fully consumed, and pay the plaintiff therefor the sum of one-half cent per head of sheep per day; that at the date of making the sale, the wheat was in good condition for grazing and pasturing purposes, and would have furnished pasturage for 2,000 head of sheep for ninety days; that the defendant failed to furnish or pasture sheep upon the wheat until the latter part of November, 1912, at which time it grazed about 3,000 head of sheep upon the land mentioned for a period of about one week's time; that by reason thereof the plaintiff has been damaged in the sum of \$900.

On a second cause of action, the plaintiff sought to recover the sum of \$105, this being the amount which would be due under the contract for the number of sheep supplied during the latter part of November, for the time which they were pastured upon the land.

The defendant denied the allegations of both the first and second causes of action as stated in the complaint, and by way of counterclaim alleged: That about the 27th day of July, 1912, the plaintiff stated to the defendant that the former had water and wheat pasture in Grant county sufficient for 5,000 head of sheep; that the defendant offered to the plaintiff to purchase sheep in the market and to pasture them on the plaintiff's wheat for one-half cent per sheep per day, which offer was accepted; that thereafter the defendant bought and shipped to the pasture 2,094 head of sheep and, on arrival, found that the water and wheat pasturage had been misrepresented by the plaintiff; that there was feed for only about one day, and insufficient water for any time; that by reason thereof the defendant was compelled to take the sheep to other pasturage, which caused them to shrink in size, and caused loss by delay in feeding for market, to the damage of the defendant amounting to \$2,094.

By reply, the allegations of the counterclaim were denied. Upon issues framed by the pleadings, the cause was tried to the court and a jury. A verdict was returned in favor of the

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plaintiff. Motion for judgment notwithstanding the verdict and for a new trial being made and overruled, a judgment was entered upon the verdict in the sum of \$600. The defendant appeals.

Without detailing the evidence, it may be stated generally that the evidence produced by the respondent tended to support the allegations of the complaint. The evidence offered by the defendant tended to support the defendant's denial of the material allegations of the complaint, and the facts stated in its counterclaim. The respondent's evidence tended to support his denial of the allegations of the counterclaim. The appellant claims, however, that there was a departure from the complaint in the evidence offered by the respondent, in that the first cause of action in the complaint stated a cause of action for the sale of the wheat, while the evidence showed a contract for pasturage. This contention cannot be sustained. The complaint, properly construed, states a first cause of action for damages for failure to furnish the sheep at the time agreed upon. When all the allegations are considered, this is plainly its proper construction. The evidence offered was to the same effect. Since there was evidence supporting both the allegations of the complaint and of the counterclaim, the question became one for the jury. The appellant in its brief makes no complaint of the instructions given by the trial court to the jury. We find no error in the record which would justify this court in reversing the judgment and directing a new trial.

The judgment will be affirmed.

MORRIS, C. J., CROW, MOUNT, and FULLERTON, JJ., concur.

[No. 12322. Department One. April 20, 1915.]

STATE BANK OF CLARKSTON, *Respondent*, v. F. G. MORRISON,
Appellant.¹

DEPOSITIONS—OBJECTIONS—WAIVER. A general objection to the reading of a deposition of a witness at the time it was offered in evidence, without basing the objection upon some specific ground of inadmissibility, waives the necessity of the opposing party proving that the deposition was authorized under the statute.

BILLS AND NOTES—INDORSEMENT—CONSIDERATION. Under Rem. & Bal. Code, § 3415, providing that every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value, the burden is upon an accommodation indorser to show that the indorsement was without consideration to him or to the makers.

BILLS AND NOTES—ACTIONS—SUFFICIENCY OF EVIDENCE—CONSIDERATION FOR INDORSEMENT. In an action on a promissory note, consideration for a guarantee by an accommodation indorser, is sufficiently shown, where there was evidence that the bank examiner was requiring payment or securing of four certain notes held by the bank, all executed by the same makers; that the president of the bank entered into an agreement with defendant, who was interested with the makers and had previously accommodated them, not to bring suit on the note if the latter would guarantee the note in controversy; that defendant did guarantee the note in consideration that suit should not be immediately brought thereon; and paid interest and acknowledged his personal liability thereon; and that, as part of the same transaction, the president of the bank had himself taken up the three other notes so that suit might not be brought thereon.

Appeal from a judgment of the superior court for Asotin county, McCroskey, J., entered June 16, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a promissory note. Affirmed.

C. H. Baldwin and Geo. W. Tannahill, for appellant.

E. J. Doyle, John C. Applewhite, and Fred E. Butler, for respondent.

¹Reported in 147 Pac. 875.

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Opinion Per MOUNT, J.

MOUNT, J.—This action was brought by the plaintiff to recover upon a promissory note for the principal sum of \$2,770, signed by the defendants W. A. Elliott and A. D. Gritman, and alleged to have been guaranteed in writing by the defendant F. G. Morrison. The defendants Elliott and Gritman defaulted, and a judgment by default was entered against them. F. G. Morrison answered, admitting that he indorsed the note after it had been executed, and alleged, in substance, that the indorsement was for the sole accommodation of the bank, and not for the accommodation of the makers; that the indorsement was without consideration, and, for that reason, he was not liable on the note. The answer further alleged that the note had been materially altered after his indorsement, and, for this reason, he was not liable thereon. Upon these issues the case was tried to the court and a jury. A verdict was returned in favor of the plaintiff for the amount of the note, with interest, against the defendant Morrison. Thereafter, a judgment was entered upon the verdict. The defendant Morrison only has appealed.

The respondent moves to dismiss the appeal because it is claimed that the defendants Elliott and Gritman appeared in the action and were not served with the notice of appeal. In view of the fact that we are not clear that the action should be dismissed, and in view of our conclusion that the case must be affirmed upon the merits, we deem it unnecessary to pass upon the motion.

A number of errors are assigned by the appellant in his opening brief, but he is content to rest upon two points: First, that the court erred in not striking a deposition of Ethel A. Clark, and second, that no new consideration is shown for Morrison's guarantee; that the consideration relates to a past transaction, and is void and unenforceable.

Prior to the trial of the case, notice was served upon counsel for the appellant to the effect that, on a certain day, the deposition of this witness would be taken in a certain office of a notary public in the city of Clarkston, in the county of

Asotin. Pursuant to this notice, the deposition of Miss Clark was taken, and was offered to be read in the evidence, when counsel for the appellant stated: "I think I will object to it and save the record." No specific objection was made at that time. The deposition was then read to the jury. Afterwards, at the close of the case, the appellant moved the court to instruct the jury to disregard the deposition, for the reason that no foundation had been laid for taking the deposition as required by Rem. & Bal. Code, § 1231 (P. C. 81 § 1079), because it was not shown that the witness resided out of the county or more than 20 miles from the place of trial, or that the witness was about to leave the county to go more than twenty miles from the place of trial, and will probably continue absent when the testimony is required, or that the witness is sick, infirm or aged so as to make it probable that she will not be able to attend the trial, or that the witness resides out of the state. The court denied this motion. It is now argued by the appellant that this was error.

If the taking of the deposition was not based upon any of the statutory grounds, that fact should have been called to the attention of the court, and the reason for the objection should have been given at the time the deposition was read in evidence. No reason was stated for the objection at that time. It was clearly the duty of the appellant to object to the deposition upon some specific ground, in order that the plaintiff who offered the deposition might, if he could, prove that it was authorized under the statute. Not having made such objection at that time, the appellant waived it. In the case of *Hennessy v. Niagara Fire Ins. Co.*, 8 Wash. 91, 35 Pac. 585, 40 Am. St. 892, where two depositions were taken a short time before the case was brought to trial, for the reason that the witnesses were about to depart from the jurisdiction of the court, and where it was claimed that these depositions were improper, this court said:

"It is not claimed that there were not sufficient grounds for taking them in the first instance, but it is contended that

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Opinion Per Mount, J.

under § 1677, Code Proc., it should have been made to appear at the trial by the party offering them that the witnesses could not be brought to testify in person. We are of the opinion that this point is not well taken. Nothing appearing to the contrary, it will be presumed that the reasons which existed at the time the depositions were taken, and which authorized them, were still in existence at the trial, and it was incumbent on appellant to show otherwise to avail itself of such objection."

Under this rule, the respondent might have shown, at the trial at the time the deposition was read, that the witness was not within the county, or not within 20 miles of the county seat; and clearly if such fact had been shown, it would have been proper to read the deposition in evidence. Or, if the appellant desired to rely upon the reception of this deposition as error, he should have shown that the witness was within 20 miles of the place of trial, or was within the county at that time, and the witness' oral evidence obtainable. We think there is no merit in this point.

It is strenuously argued by the appellant that there was no consideration shown for the note; and it is contended, for that reason, the court should have sustained a motion for nonsuit at the close of the plaintiff's evidence, and directed a verdict at the close of all the evidence. It was conceded at the trial that the appellant had indorsed this note. The statute provides, Rem. & Bal. Code, § 3415:

"Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value."

It is plain, under this statute, that it was not necessary for the plaintiff to prove that the indorsement was for value. The fact that the appellant indorsed the note imports value and consideration under the statute. The burden, therefore, was upon the appellant to show that the indorsement was without consideration moving either to him or to the makers of the note.

The president of the respondent bank testified that the bank held this note in suit, and three other notes against the same makers; that the bank examiner had instructed the officers of the bank to either collect these notes by suit or to secure the same; that, knowing that the appellant, Mr. Morrison, was interested with the makers of these notes, and had accommodated them upon previous occasions, he went to the appellant and stated to him, in substance, that suit would be brought upon these notes unless they were secured; and that thereupon the appellant agreed to and did guarantee payment of this particular note upon consideration that a suit would not immediately be brought thereon. And the president of the bank also testified that, as a part of the same transaction, he himself agreed that, if the appellant would guarantee the payment of this note for \$2,770, the president of the bank would take up the three other notes, amounting to \$4,000, against the same makers, so that suit might not be brought upon any of the notes, which he did; and that thereafter for many months suit was not brought upon the notes because of the guarantee, and the appellant paid interest thereon and acknowledged his personal liability. The appellant denied this agreement, and testified, in substance, that he indorsed the notes simply for the accommodation of the bank, and not for the accommodation of the makers of the notes. There was a sharp issue of fact upon the question of consideration, and thus a question of fact for the jury. It is not claimed that the court improperly instructed the jury upon these points. The instructions, which are in the record, fully and fairly cover the questions, and properly submitted them to the jury. The jury found in favor of the plaintiff, finding that the presumption of indorsement for value was not overcome by the evidence offered on the part of the appellant.

We find no error in the record, and the judgment is therefore affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ.,
concur.

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Opinion Per MORRIS, C. J.

[No. 12383. Department Two. April 20, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Mary
Struntz et al., Plaintiff, v. SPOKANE COUNTY et al.,
Respondents.*¹

EMINENT DOMAIN—RIGHT OF PROPERTY OWNER—ABANDONMENT OF PROCEEDINGS. A decree in condemnation proceedings giving a county a right to appropriate land for a county road upon payment of the award is not an appropriation of the land, entitling the landowner to payment of the award; hence the county could not be forced to proceed to a consummation of the appropriation, when the county board, in the exercise of its legislative discretion, has decided to abandon proceedings; as the courts will not control discretion of a legislative character.

EMINENT DOMAIN—RIGHT OF PROPERTY OWNER UNDER JUDGMENT OF APPROPRIATION. The entry of judgment on an award in condemnation proceedings gives no vested right to the damages awarded, since the condemning party can obtain no vested right in the land until it has paid the award, and hence the other party can have no vested right in the award until, by its payment, title to the land is vested in the condemning party.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered July 30, 1914, upon findings in favor of the defendants, dismissing an action to compel the issuance of a warrant in payment of a condemnation award, tried to the court. Affirmed.

P. C. Shine and Geo. W. Belt, for appellant.

George H. Crandell and Ira Honefenger, for respondents.

MORRIS, C. J.—In 1908, the board of county commissioners of Spokane county, pursuant to the power conferred by statute, commenced proceedings to establish a county road in part across and over lands of relators. An award was made to relators for the value of the land to be taken, which was refused, whereupon an action was commenced to condemn the right of way over relators' lands and to ascertain the damages

¹Reported in 147 Pac. 879.

to be paid, which resulted in a verdict assessing the damages for the land taken, and damages to the remainder of the relators' land because of such taking, in the sum of \$2,875. A judgment was entered upon this verdict, which provided that, upon the payment of the award, the county might appropriate the designated part of relators' lands for the purpose of a public highway, with costs to relators. The board of county commissioners were dissatisfied with the amount of this award, and determined to discontinue and abandon the proceeding, serving notice of such abandonment and discontinuance upon relators. Subsequently, relators satisfied the judgment of record, and presenting a certified copy of such satisfaction to the county auditor, demanded a warrant in payment of the judgment, which demand was refused, and relators then sued out a writ of mandamus in which it was sought to require the board of county commissioners to authorize the issuance of a warrant to relators in the amount of such judgment, and to proceed with the establishment of the road. Upon a hearing of this writ, the lower court found the facts as we have recited them, and that a warrant had been refused relators for any part of such judgment "except judgment for costs," and denied the writ. Relators appeal.

Whether or not relators were entitled to the relief prayed for depends upon the right of the board of county commissioners to abandon and discontinue the condemnation proceedings. That such right exists seems clearly established by the great weight of authority. The purpose of an award by a jury or otherwise in condemnation proceedings is simply to fix the amount to be paid by the condemner before it can appropriate land to the desired purpose, and when this price is ascertained, the condemning party, in the absence of statutory provisions to the contrary, has a reasonable time to determine whether to accept or refuse the land at the price fixed. We know of no rule of law that compels a party seeking to condemn land for public use to proceed with the appropriation when in its judgment the price to be paid is exorbitant. The

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Opinion Per MORRIS, C. J.

cost of construction and other necessary expenses are questions which necessarily must be taken into consideration by the board of county commissioners before it can determine whether the financial condition of the county treasury or the funds available for such purposes warrant the construction of a proposed county highway, and it is because of this that such a board is vested with a discretion to determine whether or not it will proceed; a discretion which cannot be properly exercised until it has been definitely, or at least approximately, ascertained what the total cost will be. Since the courts exercise judicial powers only, it follows that this discretion, which is of a legislative character, cannot be controlled by the courts. *Selde v. Lincoln County*, 25 Wash. 198, 65 Pac. 192; *Port Angeles Pac. R. Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305; *Chicago v. Hayward*, 176 Ill. 130, 52 N. E. 26; *Manion v. Louisville, St. L. & T. R. Co.*, 12 Ky. Law 445, 14 S. W. 532; *Poole v. Butler*, 141 Cal. 46, 74 Pac. 444; 1 Elliott, Roads and Streets, § 307; Lewis, Eminent Domain, §§ 656, 955; Dillon, Municipal Corporations (5th ed.), § 1044.

The decree in this case gives to the county the right to appropriate the land of relators upon payment of the award, and this is all that it could do, since, under our constitution, there could be no appropriation until the damages had been first ascertained and paid. The judgment entered on the verdict is, therefore, not an appropriation of the land, and no decree to that effect could be entered until this judgment had been complied with and the money paid into court for the benefit of the relators.

Relators contend that the entry of this judgment on the award gave them a vested right to the money to which the subsequent action of the board could not deprive them. Under statutes such as ours, the rights of the parties are correlative. There can be no vested right in the one party until there is a vested right in the other; and since the condemning party can obtain no vested right in the land until it has paid the award,

it follows that the other party can have no vested right in the award until by its payment title to the land is vested in the condemning party. *North Coast R. Co. v. Gentry*, 73 Wash. 188, 131 Pac. 856; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 307; *Chicago v. Barbican*, 80 Ill. 482; *Chandler v. Morey*, 195 Ill. 596, 63 N. E. 512.

The utmost that relators were entitled to was their costs in the condemnation proceedings. The lower court has found, however, to which no exception was taken, that the refusal to issue the warrant was only to the inclusion of the award, and did not extend to the judgment for costs.

Judgment affirmed.

CROW, ELLIS, MAIN, and FULLERTON, JJ., concur.

[No. 11873. Department One. April 20, 1915.]

In the Matter of the Guardianship of the Person and Estate of MARIA C. STEWART, a Person of Unsound Mind.

D. J. HEFFERNAN, *Guardian of the Person and Estate thereof in Florida, et al.*, *Appellants*, v. R. E. BUTLER, *Guardian of the Person and Estate thereof in Walla Walla County, Washington, Respondent*.¹

INSANE PERSONS—APPOINTMENT OF ANCILLARY GUARDIAN—ACTION TO VACATE—EVIDENCE. In an action by a guardian for a person of unsound mind, appointed in the state of Florida, to vacate an appointment of a guardian for the same ward in the state of Washington, evidence showing the neglected condition of the ward in Florida was material as tending to show the good or bad faith of the Florida relatives, who had agreed to support and care for her in consideration of lands conveyed to them by her deceased husband, and as tending to advise the court of her condition so that her rights to protection might be made known.

INSANE PERSONS—RESIDENCE OF INSANE PERSON—GUARDIANSHIP. A finding is warranted that an incompetent, for whom guardians had been appointed, both in the state of Florida and in the state of Washington, was a resident of this state where there is nothing to

¹Reported in 147 Pac. 1153.

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Opinion Per CROW, J.

show that she and her husband had ever acquired a legal residence in Florida, other than the investment of money there and several visits to that state, on one of which the husband died, while on the other hand they had valuable interests in this state, and it is conceded that, at all times prior to the last visit to Florida, they had been citizens and residents of the state of Washington.

INSANE PERSONS—PROPRIETY OF APPOINTMENT OF GUARDIAN—PROPERTY OF WARD—CHOSE IN ACTION. A right of action by a person of unsound mind, to set aside a conveyance executed by her while laboring under the disability of mental incapacity, constitutes property in the county wherein the realty is located, and warrants the appointment of a guardian therein for the enforcement of her interests.

INSANE PERSONS—PROTECTION OF INCOMPETENT—DOMICILE—POWER OF COURT. The appointment of a guardian for the estate of a person mentally incompetent, is within the power of the superior court of the county wherein such incompetent has property, whether such incompetent be a resident or a nonresident of the state; under Const., art. 4, § 6, conferring general jurisdiction upon the superior courts of the state, and giving jurisdiction "in all special cases and proceedings as are not otherwise provided for," and under Rem. & Bal. Code, § 1654, providing that the several superior courts in their respective counties shall have power to appoint guardians for insane persons and incompetents, and of their estates, real and personal, and Id., §§ 1622-1625, providing the procedure for the appointment of guardians of incompetents wherein appointment for non-resident insane persons is recognized.

Appeal from a judgment of the superior court for Walla Walla county, Miller, J., entered November 11, 1913, upon findings in favor of the defendant, dismissing an application to vacate the appointment of a guardian for an insane person, tried to the court. Affirmed.

F. L. Stotler, for appellants.

T. P. & C. C. Gose, for respondent.

CROW, J.—This proceeding was instituted in the superior court of Walla Walla county by D. J. Heffernan, a foreign guardian of the person and estate of Maria C. Stewart, appointed in the state of Florida, against R. E. Butler, guardian of the person and estate of Maria C. Stewart, appointed by the superior court of Walla Walla county, Wash-

ington, to require R. E. Butler to show cause why he should not be discharged as guardian and why the order appointing him should not be vacated. Afterwards Charles B. Stewart, claiming to be a party in interest, was joined as a petitioner. From an order dismissing the application the petitioners D. J. Heffernan and Charles B. Stewart have appealed.

Appellants, citing and commenting on Rem. & Bal. Code, §§ 1622 to 1625, and §§ 1654 to 1661 (P. C. 409 §§ 683-689, 747-761), contend that the superior court of Walla Walla county was without jurisdiction to appoint R. E. Butler as guardian of Maria C. Stewart, and that such appointment is void, for the reasons, (1) that Maria C. Stewart is not a resident of Walla Walla county, Washington, and (2) that she has no property or estate within Walla Walla county. Appellants further claim that Maria C. Stewart is a resident of Florida, and that appellant D. J. Heffernan, on January 25, 1913, was appointed guardian of her person and estate by the county court of Dade county, in that state.

The following facts are shown by the record: That Alexander Stewart, hereinafter mentioned as Alex Stewart, now deceased, and Maria C. Stewart, were married in the year 1885; that at all times thereafter and until the year 1911, their unquestioned residence was in Walla Walla county, Washington; that they accumulated an estate of the value of about \$75,000; that for many years Maria C. Stewart has been insane and mentally incompetent to attend to any business affairs; that between 1910 and 1912, Alex Stewart invested about \$50,000 in the state of Florida; that in 1911 he took his wife to Idaho, where they remained with relatives for about one year; that in September, 1912, they went to Florida, where Alex Stewart died in November, 1912; that as nearly as can be ascertained from the record, all his property and investments in the state of Florida had before his death passed into the hands or control of his relatives, a number of whom resided in that state; that in October, 1911,

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Alex Stewart, as party of the first part, and Barr P. Stewart, Elizabeth C. Stewart, Charles B. Stewart, Edgar L. Stewart, and Miner F. Stewart, his relatives, as parties of the second part, entered into a written agreement which recited that "Alex Stewart of Waitsburg, Washington," had theretofore caused to be conveyed and transferred to the parties of the second part certain real and personal property situate in Florida, Washington, and other states, and in substance provided that the purpose of the contract was to secure to Alex Stewart and to his invalid and demented wife, and to each of them, maintenance and support so long as they should live. A copy of this contract may be found in our opinion in *Stewart v. Bank of Endicott*, 82 Wash. 106, 143 Pac. 458, and need not be repeated here.

After the death of Alex Stewart, Barr P. Stewart, his nephew, was appointed administrator of his estate in Florida, although it does not appear that Alex Stewart had title to or control of any property in that state at the time of his death. Maria C. Stewart remained in Florida with the relatives of her deceased husband until she was removed to Washington under the circumstances hereinafter stated. On January 25, 1913, an order was made by the county court of Dade county, Florida, appointing D. J. Heffernan guardian of the estate of Maria C. Stewart, which order in part reads as follows:

"It is ordered, adjudged and decreed, that said D. J. Heffernan be and he is hereby appointed guardian of the estate of said insane person, and that upon taking the prescribed oath, and entering into a bond to be approved by this court, in the sum of five hundred and no-100 dollars, letters of guardianship as aforesaid be granted to said applicant."

It will be noted from this order that letters of guardianship were not to be issued until the bond was executed and filed. Heffernan did not file any bond until July 30, 1913, at which time Maria C. Stewart had been removed to the state of Washington, and R. E. Butler had been appointed

as her guardian in Walla Walla county, Washington, and had commenced the action hereinafter mentioned against Charles B. Stewart and others to set aside certain deeds, for her separate property, alleged to have been fraudulently obtained. Maria C. Stewart had no kindred in the state of Florida, but was under the control of relatives of her deceased husband. She had kindred in this state, one of whom, W. G. Preston, her brother, resided in Waitsburg, Washington. In February, 1918, W. G. Preston employed M. O. Pickett, an attorney at law, to go to the state of Florida, accompanied by Mrs. Pickett, for the purpose of securing the return of Maria C. Stewart to this state. The evidence of Mr. and Mrs. Pickett, which is undisputed, shows that when they arrived in Florida they found Maria C. Stewart in a neglected, pitiable, and filthy condition; that she was in feeble health and unable to care for herself, and that she was almost entirely without clothing and in the most abject want. Although the record shows that her husband's relatives had agreed to maintain her in comfort, and although it appears that she had community interests in property in this state of the value of \$26,000, that she had separate property in Whitman county in this state of the value of \$8,000, and that she claimed real estate in the city of Waitsburg, in Walla Walla county, which had been deeded by her when she was in a state of total mental incapacity, the evidence further shows that, notwithstanding these property rights, and notwithstanding the \$50,000 which her husband had taken to Florida, she was kept in this forsaken, pitiable, and abject condition by relatives of her husband who, through the appellant D. J. Heffernan, now seek to have her returned to Florida for the manifest purpose of thwarting legal proceedings instituted in this state to secure her the property rights and that comfortable maintenance to which she is entitled.

Appellants contend that the evidence of Mr. and Mrs. Pickett showing her neglected condition in Florida was incompetent and should have been excluded, but it was material

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as tending to show the good or bad faith of the appellants here involved, and as also tending to advise the court of her condition so that her rights to protection might be made known. The record further shows that, before Mr. Pickett could obtain permission to return Mrs. Stewart to the state of Washington, he, as representative of her brother W. G. Preston, was required to execute the following written contract, which was duly acknowledged by all parties thereto on February 21, 1913:

"Whereas, It appears from the records of the county judge's court, in and for Dade county, Florida, that one Maria C. Stewart has lately been duly and legally declared insane and of unsound mind, and as said proceedings were had pursuant to the statutes of the state of Florida; and

"Whereas, It further appearing that after the findings of the committee and the court in the premises, the custody of the person of the said Maria C. Stewart was duly and legally adjudged into the care, custody and control of Barr P. Stewart, as administrator of the estate of Alex. Stewart, deceased; and

"Whereas, On a later date, upon a petition duly filed and having been duly considered by the court, it was ordered and adjudged that D. J. Heffernan, a responsible person, and a resident of the city of Miami, in the county of Dade, and state of Florida, was duly appointed guardian of the said Maria C. Stewart, and now has the said care, custody and guardianship of the said Maria C. Stewart; and

"Whereas, It is deemed for the best health and interest of the said Maria C. Stewart to have a change of climate, and it being the desire of her brother, William G. Preston, of the city of Waitsburg, and state of Washington, to have her pay him a visit, and having consulted with medical authorities relative to the benefit to be accrued to the said Maria C. Stewart by making the said visit; and

"Whereas, The said William G. Preston has voluntarily offered and agreed to the said guardian and administrator for the care, preservation, expense and safekeeping of the person of the said Maria C. Stewart during her said visit to the said William G. Preston, who is a natural brother of the said Maria C. Stewart, and there being no objection to

the said Maria C. Stewart paying a visit to her brother as aforesaid;

"It is therefore agreed by and between the said guardian and administrator, as well as the legally authorized agent, M. O. Pickett, who is acting for and legally authorized by the said William G. Preston to take the said Maria C. Stewart on a visit to her said brother, the said William G. Preston, the said M. O. Pickett agreeing by, for and in behalf of the said William G. Preston, who is reputed to be a man of means and able to carry his agreements into effect to take good care and furnish proper medical attention, sustenance and all required necessities to the said Maria C. Stewart during her said visit to her said brother, the said brother, to wit, the said William G. Preston.

"It is further agreed and understood that as the said Maria C. Stewart is an invalid and of unsound mind, that her visit to her said brother, William G. Preston, shall in no way or manner be a charge upon the estate of Alex. Stewart, deceased, and no part of the expense thereon shall be borne by Barr P. Stewart, as administrator of said estate, or individually.

"Inasmuch as the said Barr P. Stewart and other of his relatives have contracted to and with Alex. Stewart during his lifetime to support the said Maria C. Stewart as long as she should live, it is hereby specifically contracted and agreed that the said William G. Preston is to absolve the said Barr P. Stewart and the other of his relatives named in the said contract from any expense or charge under said contract on account of said visit, it being the intention of the parties hereto that the conditions in relation to said contract between Barr P. Stewart and Alex. Stewart, now deceased, shall remain in *statu quo* and be in no manner altered or changed on account of the visit of Maria C. Stewart, as hereinbefore specified, except that none of the expense of said trip, or Mrs. Stewart's maintenance while away from Miami, Florida, shall be paid by Barr P. Stewart, or his relatives. The said William G. Preston, by his attorney, M. O. Pickett, and the said attorney as a personal obligation, hereby agree to report to Barr P. Stewart, administrator, and D. J. Hefferman, guardian, every three months, and oftener if requested, in relation to the physical condition of the said Maria C. Stewart.

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"It is further agreed that the said Maria C. Stewart shall have kind and considerate care and attention, and if such should not be the case, or if the said Maria C. Stewart should be in any manner mistreated at any time, her visit shall immediately, without notice, terminate, and the said William G. Preston hereby agrees to offer no objection whatsoever to the redelivery of the said Maria C. Stewart to the said Barr P. Stewart.

"In witness whereof, and to all of the foregoing, we, all the parties hereto, do hereby assent and sign our names.

"William G. Preston, By M. O. Pickett, His Atty.

"Barr P. Stewart, Administrator.

"D. J. Heffernan, Guardian.

In the presence of us:

"James T. Sanders.

"Agnes Zetrouer."

After this contract was executed, Mr. and Mrs. Pickett purchased suitable clothing for Mrs. Stewart and, by easy stages and with the assistance of nurses and hospital attendants secured at various points along the road of travel, brought Mrs. Stewart to Walla Walla county, in this state, where her health and physical condition have rapidly improved, although her mind seems to be utterly gone. After her return to this state, upon the application of certain of her friends, the respondent, on March 29, 1913, was duly appointed as her guardian by the superior court of Walla Walla county, and thereafter qualified as such. Mrs. Stewart was duly served with process, and was present in court at the time of the hearing which resulted in respondent's appointment. The record shows that, for many years prior to 1906, Maria C. Stewart owned and held title to certain lots in Waitsburg, Walla Walla county, Washington, as her separate estate; that on April 21, 1906, she conveyed these lots to her husband, Alex Stewart, so as to make them his separate estate; that thereafter, on September 18, 1912, shortly before his death, he conveyed them to the appellant Charles B. Stewart, his half brother; that respondent, R. E. Butler, as

guardian for Mrs. Stewart, claiming that she was insane, that the deed from her was fraudulently obtained, that Alex Stewart conveyed the lots to Charles B. Stewart without consideration, and that Charles B. Stewart then knew she was insane and incompetent when she had conveyed the lots to her husband, commenced an action in the superior court of Walla Walla county against Charles B. Stewart, his wife, and others, to set aside the deeds and quiet her title. It was after the commencement of this action that the appellant D. J. Heffernan filed his bond in the county court of Dade county, Florida, as guardian of Maria C. Stewart, and instituted this proceeding to vacate the appointment of R. E. Butler.

The mere statement of these facts is sufficient to compel an affirmance of the order of the trial court refusing to vacate R. E. Butler's appointment as guardian. The record does not convince us that Alex Stewart or his demented wife ever obtained a legal residence in the state of Florida, or that he intended to remain there. He made his last trip in September, 1912, and died in the following November. It is conceded that, at all times prior to 1911, he and his wife had been citizens and residents of the state of Washington. They had valuable property interests in this state at the time of his death, and there is no convincing evidence that they ever became citizens of any other state. This being true, the trial judge was warranted in finding, as he did, that Maria C. Stewart is a resident of the state of Washington.

There is no merit in appellants' contention that Maria C. Stewart had no property in Walla Walla county. She claimed to be the owner of the lots in Waitsburg in that county, above mentioned, and, although it does not appear from this record, we might state that, in the action brought by her guardian, she obtained a decree quieting her title thereto, which decree we have this day affirmed in cause No. 11872, *Stewart v. Stewart*, *post* p. 202, 147 Pac. 1157. She held, or claimed to hold, the equitable title to these lots, and

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her claim was a property right which she, being a person of unsound mind, could only enforce in an action prosecuted by her guardian. It would be entirely too technical to hold that this cause of action was not properly in Walla Walla county.

Without regard to suggestions already made, and conceding that Maria C. Stewart is a nonresident of this state, without so deciding, it is apparent that the construction of our guardianship statute and the doctrine announced in *In re Sall*, 59 Wash. 539, 110 Pac. 32, 626, 140 Am. St. 885, is controlling here. We there said:

"But, construing the act as a whole, and recognizing the necessity as well as the duty of the state to protect the estates of incompetent persons, the construction put upon the statute by appellant may well be doubted. A careful examination of the law on our own account convinces us that the superior courts have an inherent jurisdiction to protect estates of nonresident, incompetent persons; and that, while it is generally said that the power to appoint guardians is purely statutory, the power in fact lies in the sovereignty of the state and the procedure only is statutory. In England, from whence we have derived our common law and the accepted heads of equity jurisdiction, the king assumed the care of insane persons and their property *in parens patriae*. After a declaration or finding of insanity, the jurisdiction in lunacy cases was held in some early cases to be no longer exercisable under the king's sign manual, but in virtue of the general powers of the court. *Ex parte Grimstone*, 2 Amb. 706; *Burford v. Lenthall*, 2 Atk. 551; *In re Fitzgerald*, 1 Ll. & G. t. P. 20, 2 Sch. & Lef. 439. Mr. Woerner, in his work on the American Law of Guardianship, § 18, says that it is the prevalent conviction of lawyers, judges, and text-writers in America that, in the absence of countervailing statutes, American courts having equity powers possess a general jurisdiction for the appointment of guardians. Story draws no distinction between the powers of American and English courts in this respect; Story's Eq. Jur., ch. 35; and Mr. Pomeroy, in his Equity Jurisprudence, at § 1306, says that American courts have this power in so far as it has not been taken away by statute. It is, therefore, held that, where the power to appoint guardians has been con-

ferred upon other courts, as, for instance, the probate court of the territory before the creation of the state of Washington, the power is cumulative and concurrent with the court of chancery. [Citing authorities.] It would follow, then, that the statute, in declaring that the court might appoint a guardian for the property of an incompetent person resident of the county, would not bar a court of general jurisdiction of its general equity powers, provided the constitution is broad enough to warrant its exercise. That the superior court of this state has such general jurisdiction has been frequently declared."

Later in our opinion we referred to the provisions of § 6 of art. 4 of the constitution of this state, relative to the jurisdiction of our superior courts, and, after quoting excerpts from *Moore v. Perrott*, 2 Wash. 1, 25 Pac. 906; *Krieschel v. Board of Comr's, Snohomish County*, 12 Wash. 428, 41 Pac. 186; *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107; *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502, and *Dodge v. Cole*, 97 Ill. 338, 37 Am. Rep. 111, we further said:

"While there are cases holding that this special jurisdiction over the estates of incompetent persons does not come to us as inherent to the equitable jurisdiction of our courts, reference to our constitution, art. 4, § 6, as construed by the cases heretofore decided by this court, will show that jurisdiction is given 'in all special cases and proceedings as are not otherwise provided for.' This must include power over the estate of an incompetent when properly brought before the court, for the object of the people in establishing their courts and defining their jurisdictions was to safeguard and protect property rights."

Surely, if the superior courts of this state have jurisdiction to appoint a nonresident of this state as guardian of an incompetent who had disappeared and was not known to be within the state, to protect his Washington property rights, as held in the *Sall* case, the superior court of Walla Walla county had jurisdiction to appoint the respondent, R. E. Butler, as guardian of Maria C. Stewart, it appearing that

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she was at the time within the jurisdiction of the court and actually present in court. If the courts of this state cannot afford relief to this unfortunate incompetent, through a guardianship proceeding, they would be without power to do justice or afford equity in any action.

Appellants seem to predicate some rights upon the contract which Mr. Pickett executed when in Florida, insist that he and Mr. Preston have violated the agreements therein contained, and claim that, by virtue of the contract and its violation, they are entitled to have Mrs. Stewart returned to Florida in order that the appellant D. J. Heffernan may discharge his pretended duties as guardian in that state. This contention is scarcely worthy of passing notice. The entire record is convincing to the effect that what the Florida parties sought to accomplish by their written contract was to rid themselves of the expense of caring for Mrs. Stewart, although they had seized all of the Florida property of her late husband and had contracted with him to care for and maintain her in comfortable circumstances. It was not until they feared they were about to lose property interests which they hoped to control in this state that they concluded their contract had been violated by Mr. Preston and Mr. Pickett, and that they in some manner caused the Florida guardian to institute this proceeding. It was then that they concluded the courts of this state had no jurisdiction to appoint a guardian for Mrs. Stewart or protect her interests, and insisted that she should be returned to the state of Florida. Such contentions, under the facts here shown, do not commend themselves to a court of justice.

The judgment is affirmed.

CHADWICK, PARKER, MAIN, and ELLIS, JJ., concur.

[No. 11872. Department One. April 20, 1915.]

MARIA C. STEWART, *by her Guardian R. E. Butler,*
Respondent, v. CHARLES B. STEWART *et al.*,
*Appellants.*¹

APPEAL AND ERROR—REVIEW—AMENDMENT REGARDED AS MADE. In an action by the guardian of a person of unsound mind to set aside a deed of her separate property to her husband, the failure of the complaint to allege the grantee's knowledge of the grantor's insanity, when not demurred to, will be deemed amended to conform to evidence which indisputably showed knowledge of her mental condition on the grantee's part.

INSANE PERSONS — APPOINTMENT OF GUARDIAN — COLLATERAL ATTACK. In an action by the guardian of a person of unsound mind to cancel a deed made by her, an attack on the validity of the guardian's appointment, being collateral to the cause in issue, would not be entitled to consideration by the court.

APPEAL AND ERROR—REVIEW—FINDINGS. Findings of the trial court will not be disturbed, where the evidence, though conflicting, clearly preponderates in favor of the findings.

Appeal from a judgment of the superior court for Walla Walla county, Miller, J., entered November 11, 1913, upon findings in favor of the plaintiff, in an action to set aside deeds, tried to the court. Affirmed.

F. L. Stotler, for appellants.

T. P. Gose and *M. O. Pickett*, for respondent.

Crow, J.—This action was commenced by Maria C. Stewart, by R. E. Butler, her guardian, against Charles B. Stewart, Elizabeth Stewart, his wife, and other defendants, to set aside and annul a deed from Maria C. Stewart to Alexander Stewart, for certain lots in Waitsburg, Walla Walla county, Washington, executed on April 21, 1906; and also to set aside and annul a later deed from Alexander Stewart to the defendant Charles B. Stewart, for the same lots, executed on

¹Reported in 147 Pac. 1157.

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September 18, 1912. The second amended complaint, in substance, alleged that, on March 29, 1913, R. E. Butler had been duly appointed by the superior court of Walla Walla county, Washington, as guardian of the person and estate of Maria C. Stewart, a person of unsound mind, and that he qualified as such guardian on April 2, 1913; that Maria C. Stewart is the widow of Alexander Stewart, who died in December, 1912, in the state of Florida (the evidence shows that he died in November, 1912); that plaintiff Maria C. Stewart is now, and for many years last past has been, owner in her separate right of certain lots in Waitsburg, Walla Walla county, Washington; that on April 21, 1906, Alexander Stewart, her husband, sought and obtained from her, without consideration, a deed for the lots for the purpose of making them his separate estate; that at the time, she was of unsound mind and did not understand the deed she executed; that afterwards, on September 18, 1912, Alexander Stewart, without consideration, by warranty deed, conveyed the lots to the defendant Charles B. Stewart, his half brother, who then well knew that Maria C. Stewart was of unsound mind and incompetent to execute a deed when she conveyed the lots to her husband.

Answering this second amended complaint, the defendants Charles B. Stewart and wife admitted the execution of the deeds; denied that Maria C. Stewart was of unsound mind when she conveyed the lots; alleged that she was then of sound mind, that she executed her deed freely and voluntarily, understanding her acts in so doing, and that she received a consideration therefor. For a second affirmative defense, they alleged that Maria C. Stewart is, and for several years has been, a resident of the state of Florida; that prior to the commencement of this action she had, and now has, a legally appointed guardian in Florida; that she has no property within the jurisdiction of the superior court of Walla Walla county, Washington; and that if R. E. Butler, who purports to be her guardian in this state, has been appointed

as such, his appointment is invalid and of no force and effect, for the reason that Maria C. Stewart has no property, and had none at the time of his appointment, within the jurisdiction of the court; that she is a resident of Florida, and that R. E. Butler, as her guardian, has no legal capacity to sue in the superior court of Walla Walla county or any other court of the state of Washington, for or on behalf of Maria C. Stewart.

After hearing the evidence, the trial judge, in substance, found, that long prior to the commencement of this action, Maria C. Stewart acquired the real estate by gift; that the same was her separate property; that on April 21, 1906, her husband Alexander Stewart sought and obtained from her a deed to the lots with the intent and purpose of making them his separate property; that she received no consideration therefor; that the deed was executed by her at a time when she was of unsound mind and had no contracting power; that Alexander Stewart, at the time and for two years prior thereto, well knew her mind was unsound and so decayed that she could not understand the deed which she executed; that afterwards, on September 18, 1912, Alexander Stewart, without consideration, made and executed a warranty deed to Charles B. Stewart for the real estate, and that Charles B. Stewart, then and prior thereto, well knew that Maria C. Stewart, when she signed the deed to her husband, was insane, of unsound mind, and had no contracting power. Upon these findings a decree was entered, cancelling and setting aside the deeds, and quieting title to the lots in Maria C. Stewart. From this decree, the defendants Charles B. Stewart and his wife have appealed.

Appellants' first contention is that the second amended complaint, upon which the cause was tried, does not state a cause of action, their point being that it does not allege that Alexander Stewart, to whom Maria C. Stewart deeded the lots on April 21, 1906, knew she was then insane. The record does not show that any demurrer was interposed by appel-

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lants. The second amended complaint alleges that Alexander Stewart was the husband of Maria C. Stewart, and that she was insane when the deed was executed. The reasonable inference from these facts would be that he knew of her insanity. Conceding, however, without deciding, that a further allegation of knowledge on his part was necessary, the evidence clearly shows, that he knew her condition; that he mentioned it to many other persons; that she was under his personal supervision and care; that her condition was not one of intermittent insanity, but was one of constantly decreasing mentality; that prior to the execution of the deed, he took her east and consulted eminent specialists on mental diseases in her behalf, and that when he returned he stated nothing could be done for her. The proof shows that her condition was known to him, and the complaint at this time will be considered amended in accordance with the facts proven.

Appellants next contend that the trial judge erred in holding R. E. Butler was qualified as guardian, and in rejecting appellants' offer of evidence to show, (1) that Maria C. Stewart had no property in Walla Walla county, Washington; (2) that she was not a resident of this state, and (3) that the respondent Butler had no capacity to sue. This evidence was offered in support of appellant's second affirmative defense above mentioned. The trial court properly held that the attack thus made on the appointment and authority of R. E. Butler as guardian was collateral. The record shows that another proceeding had been commenced to directly attack and vacate the appointment of R. E. Butler as guardian, for the identical reasons herein pleaded. While it is not disclosed by this record, we may say that, on a trial of that proceeding, the application to vacate the appointment was dismissed, and we have this day affirmed that judgment in *In re Stewart*, ante p. 190, 147 Pac. 1153. On the authority of *In re Sall*, 59 Wash. 539, 110 Pac. 32, 626, 140 Am. St. 885, we there held, and we now

hold, that the court had jurisdiction to appoint R. E. Butler, as guardian; that he has capacity to sue in this action, and that the superior court of Walla Walla county acted within its jurisdiction in making his appointment.

Appellants' remaining contentions all go to the proposition that the trial judge erred in its findings, that Maria C. Stewart was insane when she executed the deed to her husband; that her husband knew she was insane; and that the appellant Charles B. Stewart knew she was insane when she conveyed the lots. Without repeating the evidence, which we have carefully examined, we state our conclusion that, although some conflict is disclosed, it clearly preponderates in respondents' favor, and sustains the findings made. As to the knowledge of Charles B. Stewart, it is shown that he visited Alexander Stewart and Maria C. Stewart, his wife, at different times; that they visited him in Idaho, and that he had ample opportunity for observing her incompetent and insane condition, which is clearly shown by the evidence and must have been apparent to him. Although he denied knowledge of her condition, his credibility was for the court. He was an interested party. It is manifest that the trial judge refused to credit his statements, and we are satisfied that he was justified in so doing. It may be further remarked that Charles B. Stewart was not a purchaser for value or in good faith. The deed to him, which is in evidence, recites a consideration of one dollar, and no evidence was introduced to show that any other or further consideration was paid by him.

The judgment is affirmed.

CHADWICK, PARKER, MAIN, and ELLIS, JJ., concur.

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[No. 12360. Department Two. April 20, 1915.]

T. C. NUTTER *et al.*, *Appellants*, v. COWLEY INVESTMENT
COMPANY *et al.*, *Respondents*.¹

MORTGAGES—ABSOLUTE DEED AS MORTGAGE—EVIDENCE. When property has been conveyed by a deed absolute in form, without any contract of defeasance or other written instrument showing that it was intended as a mortgage, the contention that it was intended as a mortgage required clear, convincing and cogent evidence to uphold it.

APPEAL AND ERROR—REVIEW—HARMLESS ERROR. In an action to have a deed adjudged to be a mortgage, to which the defendants answered that the deed was absolute and not intended as a mortgage, error of the court in failing to so find, and entering a decree of foreclosure cannot be reversed on plaintiff's appeal, where defendant filed no cross-appeal and accepted the decree of foreclosure; since the error was prejudicial to defendants and not to plaintiffs.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 25, 1914, upon findings in favor of the defendants, in an action to reform a deed, tried to the court. Affirmed.

Shorett, McLaren & Shorett, for appellants.

Howard H. Startzman, for respondents.

CROW, J.—This action was commenced by T. C. Nutter and M. A. Nutter, his wife, against the Cowley Investment Company, a corporation, and W. M. Cowley, to have a deed adjudged to be a mortgage, and for the further purpose of obtaining credits on the alleged mortgage indebtedness by reason of usury exacted by the defendants. The only interest the defendant W. M. Cowley seems to have in the litigation is that he is an officer of the corporation, the grantee named in the deed, and acted in its behalf. The defendants, by their answer, alleged that the deed was absolute, and that it conveyed the fee simple title; denied that it was intended as a mortgage, and alleged that the defendant corporation

¹Reported in 147 Pac. 896.

contracted to resell the property to plaintiffs. After hearing the evidence, the trial judge announced that, in his opinion, the plaintiffs had taken an undue advantage of the defendants; that the plaintiffs intended the deed to be a mortgage, but that the defendants understood and intended it to be an absolute conveyance. The trial court, however, found that the deed was a mortgage; that no usury had been exacted by defendants, and that the indebtedness secured, and which was due from plaintiffs to the defendant corporation, was \$1,640, with interest from June 17, 1913, at eight per cent per annum. Upon these findings, a decree was entered, adjudging the deed to be a mortgage and decreeing its foreclosure, without costs to defendants, but with costs to plaintiffs. From this decree, the plaintiffs have appealed.

Appellants contend that the trial judge erred in entering a decree of foreclosure, in permitting the cross-complaint of the respondents to be amended for the purpose of asking a foreclosure, in determining that any indebtedness was due, and, because of the alleged usury, in allowing interest to defendants.

The evidence shows, that the real estate formerly belonged to appellants; that title thereto had been conveyed to one Rinhor Reetz, who had commenced an action against them to quiet his title; that Rinhor Reetz and appellants, on November 6, 1912, entered into a written stipulation whereby it was agreed that, within six months, appellants should pay Reetz \$1,500, with six per cent interest, who, in the event of such payment, was to dismiss the action and convey the real estate to appellants; otherwise Reetz was to have judgment quieting his title. It further appears that appellants did not pay Reetz within the six months; that to settle with him, they applied to respondents for a loan; that respondents examined the property and, after some negotiations, refused to make a loan for the sum necessary to pay Reetz and satisfy delinquent taxes and assessments; that further negotiations between appellants and respondents resulted in respondents

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paying a compromise sum to Reetz, a small sum to appellants, and certain taxes and assessments which, with other expenses, the trial judge found amounted to \$1,530, and that Reetz, on June 17, 1913, conveyed the property to appellants, who in turn conveyed it by absolute deed to the respondent corporation. It further appears, that on the same day, June 17, 1913, appellants executed, acknowledged, and delivered to the respondent corporation a written disclaimer, in which they, in substance, recited the above transactions, and further stated that, whereas

“these parties [appellants] are wholly without money with which to pay off the claim of said Reetz, and have requested The Cowley Investment Company to take up said Reetz claim and give said Nutters a contract of sale for said premises all of which will more fully appear by contract of sale this day made by said Investment Company to T. C. Nutter. That had it not been for the action of said Investment Company said land would have been wholly lost to said T. C. Nutter and wife,

“Now, therefore, in consideration of the above recital of facts and of the sum of one dollar to it in hand paid by said Cowley Investment Company, said T. C. Nutter and May A. Nutter his wife, hereby disclaim that they have any interest in and to the above described real estate, other than the right of purchase as evidenced by said real estate contract, and acknowledge the title in said Cowley Investment Company to be absolute, subject only to said contract of sale, that said Investment Company does not hold said title as mortgagee, and has the right to forfeit said contract, strictly according to the terms thereof;”

that respondents prepared and executed a contract to resell the real estate to appellants at a price and upon terms to which appellants had agreed; that appellants failed to execute the same; that by this contract, respondents agreed to resell the property to appellants for \$1,675, an advance of \$150 over and above amounts paid out by them; that the same was to be payable, \$10 in cash, and in installments of \$100 every three months until June 17, 1916, when the remainder

was to be paid in full, deferred payments to bear interest at eight per cent per annum; that appellants not only failed to execute this contract, but also failed to make any further payments on the purchase price, and that on October 20, 1918, the respondent corporation served upon appellants written notice of a forfeiture of the contract of sale in accordance with its terms, for nonpayment of the purchase money.

It was after service of the notice of forfeiture that appellants commenced this action. Their claim for usury is predicated on the advance of \$150 demanded by respondents on a resale, and upon other charges for expenses which appellants contend were wrongfully made by respondents. The oral evidence given by appellant T. C. Nutter and by witnesses on his behalf, was to the effect that the only negotiations between appellants and respondents were for a loan, and that the deed was intended to be a mortgage. The written documents refute this evidence. The oral evidence of the respondent W. M. Cowley and other witnesses was to the effect that the deed was absolute, and that the respondent corporation agreed to give a contract reselling to appellants. The respondent corporation, in its answer, pleaded the contract of sale and its forfeiture, and demanded that its title be quieted. It did not claim the deed was a mortgage, nor did it demand foreclosure. When the trial judge announced his determination to decree a foreclosure, appellants objected, for the reason that no such relief was demanded in the answer. Thereupon the trial judge ordered that the answer be amended so as to demand foreclosure. Respondents have accepted the decree, taking no cross-appeal.

We have carefully examined the evidence and conclude that the trial judge erred in holding the deed to be a mortgage. We are satisfied that it was an absolute conveyance, and was so intended by the parties. All written instruments before us indicate this fact most clearly. No note was executed to respondents by appellants. We have repeatedly announced the rule that when property has been conveyed

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by a deed absolute in form, without any contract of defeasance, or other written instrument showing that it was intended as a mortgage, clear, convincing and cogent evidence will be required to establish the contention that it was intended as a mortgage. *Washington Safe Deposit & Trust Co. v. Lietzow*, 59 Wash. 281, 109 Pac. 1021; *Dempsey v. Dempsey*, 61 Wash. 632, 112 Pac. 755; *Johnson v. National Bank of Commerce*, 65 Wash. 261, 118 Pac. 21; *Kegley v. Skillman*, 68 Wash. 637, 123 Pac. 1081; *Hansen v. Abrams*, 76 Wash. 457, 136 Pac. 678.

The evidence is clear and convincing to the effect that the deed was what it purported to be, an absolute conveyance of the fee simple title, and had respondents interposed a cross-appeal, we would reverse the finding of the trial court that it is a mortgage. There is, however, no cross-appeal, and the decree that the deed was a mortgage being erroneous only, and not void, cannot be reversed on plaintiffs' appeal. It follows from our findings that no question of usury can be considered by us. In fact, there was no usury. We further find that the amount which the trial judge found to be due respondents is sustained by the evidence, as it was the purchase price which appellants agreed but failed to pay for a reconveyance.

Appellants contend, that the trial court erred in decreeing a foreclosure, as neither party demanded any such relief; that a foreclosure decree was without the issues, and that no relief can be granted a party upon a theory contrary to that disclosed by his pleadings. In support of this contention they cite *Clemmons v. McGeer*, 63 Wash. 446, 115 Pac. 1081; *Ford v. Aetna Life Ins. Co.*, 70 Wash. 29, 126 Pac. 69, and *Keeler v. Parks*, 72 Wash. 255, 130 Pac. 111. These cases are not pertinent to the issues now before us. Here the respondents claimed an absolute title. Appellants contended for a mortgage. On these issues the trial judge erroneously held against respondents, who have not appealed. They accept the decree of foreclosure. The error committed

in entering such a decree was prejudicial to respondents and beneficial to appellants. Had the trial judge held the deed absolute, as he should have done, appellants would be without any remedy, and would lose all interest in the property. As it is, respondents having accepted the erroneous decree, appellants have obtained a right of redemption from foreclosure sale to which they were not entitled. The record does not show whether there has been an execution sale on the decree; but whether there has or not, the period of redemption has not expired, as the decree of foreclosure was entered on May 25, 1914.

There being no error prejudicial to the appellants, or of which they can complain, the judgment is affirmed.

MORRIS, C. J., MAIN, ELLIS, and FULLETON, JJ., concur.

[No. 12377. Department One. April 20, 1915.]

LAES JOHNNSSON, *Respondent*, v. AMERICAN TUG BOAT
COMPANY, *Appellant*.¹

COLLISION — SUIT FOR DAMAGES — FAIRWAY — BURDEN OF PROOF. The middle of an arm of Puget Sound, four miles wide and navigable for large vessels its entire width, is not, as a matter of law, a "fairway," within the act of Congress (2 Fed. Stat. Ann. 163) prohibiting "to any vessel or boat engaged in fishing the right of obstructing a fairway used by vessels other than fishing vessels or boats;" and upon the defense of the statute, in an action for colliding with a fishing boat therein, the burden is upon the defendant to show that the location was a "fairway."

COLLISION—SUIT FOR DAMAGES—DEFENSES—FAULT AS CAUSE OF COLLISION. Carrying on the occupation of fishing without having obtained a license, in compliance with the fishing regulations of the state, is not a defense to an action for damages for injuries to a fishing boat and nets sustained in a collision in navigable waters, as there was no causal connection between the neglect to obtain a license and the collision.

¹Reported in 147 Pac. 1147.

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Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered March 9, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Coleman, Fogarty & Anderson, for appellant.

E. C. Dailey, for respondent.

PARKER, J.—The plaintiff seeks recovery of damages which he claims resulted from defendant's negligence in causing a raft of logs in tow of two of its tug boats to come into collision with and injure his fishing launch and gill net. Trial before the court and a jury resulted in verdict and judgment in favor of the plaintiff, from which the defendant has appealed.

About eight o'clock in the evening of March 17, 1913, respondent was fishing with his launch and net in the waters of Puget Sound some two and a half miles from Mukilteo. The arm of the sound in which he was fishing is about four miles wide at that point. He was near the middle thereof, though possibly somewhat nearer the west than the east shore. The wind was blowing in a northerly direction and the tide was running in the same direction. He was drifting with the wind and tide, his net trailing behind to the south some 1,800 feet. Appellant's tug boats, with the raft in tow, were going south. The boats passed about 400 feet to the west of respondent's launch. The boats were made fast to each other by a line about 100 feet long. The raft was made fast to the rear boat by a line about 500 feet long. The length of the raft was about 800 feet, and its width about 70 feet. As the tug boats approached and passed respondent's launch about 400 feet to the west, it was seen by those in charge of the boats, and its position relative to the boats was apparently well understood by them.

As the boats came opposite respondent's launch, they turned farther to the west, evidently with a view of having the raft clear the launch in safety. Respondent seeing that

there was possible impending danger of a collision with the raft, in view of the distance it was back of the boats and its length, commenced to take in his net. However, he was apparently unable to escape and came in collision with the raft, his boat and net receiving injuries thereby for which the jury awarded him \$288.50. The evidence is in conflict as to the course the tug boats took after passing respondent's launch, though at that particular time they apparently turned farther to the west. There is, however, evidence, if believed by the jury, warranting the conclusion that the tug boats very soon thereafter turned to the east, tending to bring the respondent's launch between the rear boat and the raft. This, respondent claims, was the cause of the collision with the raft, and was negligence on the part of appellant's servants in charge of the tug boats.

It is contended by counsel for appellant that it was not guilty of any negligence, and that respondent was guilty of contributory negligence. A review of the evidence convinces us that we could not so decide, as a matter of law, unless possibly it might be so decided if it could be said, as a matter of law, that appellant's rights there were superior to those of respondent by virtue of the laws of navigation. It is upon this theory, largely, that counsel for appellant rest their contention that the trial court should have taken the case from the jury upon their motions for nonsuit and directed verdict.

Counsel for appellant, assuming that appellant's rights were superior to those of respondent and that respondent was violating the laws of navigation, invoke the general rule that the burden rested upon him of showing, not merely that his fault might not have been the cause of the collision, or that it probably was not, but that it could not have been, citing *The Pennsylvania*, 86 U. S. 125; *The Providence*, 98 Fed. 133, and other authorities. Let us now inquire in what respect respondent was at fault, in the light of the laws of navigation. Counsel for appellant invoke the provision of art. 26 of the international rules to prevent collisions,

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adopted by the act of Congress of August 19, 1890, 2 Fed. Stat. Ann. 163, reading as follows:

"Sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, or lines, or trawls. This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fair-way used by vessels other than fishing vessels or boats."

Counsel seem to assume that it must be determined, as a matter of law, that respondent with his launch and net were in a "fairway" used by vessels other than fishing vessels. We are quite unable to understand how it could be determined as a matter of law, or even as a matter of fact, in the light of this evidence, that this location is a "fairway." We have noticed that the arm of the sound where this injury occurred was some four miles wide. We may add that there is nothing in the evidence to indicate other than that the whole of this four-mile width of water is all navigable for even large vessels. While the evidence is silent upon the question of the navigability of this entire stretch of water, it could well be argued that the well known facts of geography render such fact judicially noticeable, though it is not necessary to do so in the determination of this case. The burden of proof that the location was a "fairway" was upon appellant if it intended to rely upon such fact in aid of its defense in this case. The word "fairway" is defined by the Standard Dictionary as "the proper course through a channel or harbor, generally the middle." The definition which seems to be quite generally adopted by the authorities, in so far as the word has reference to navigation, rather than to state and international boundaries, is found in *The Oliver*, 22 Fed. 848, where it is said: "A fair-way is water on which vessels of commerce habitually move."

In 2 Abbott's Merchant Ships and Seaman (14th ed.), p. 947, it is said:

"The fairway is the open navigable passage used by vessels proceeding up or down the channel, and is not necessarily

the channel between the row of buoys placed to mark the edge of the deep water."

In Marsden's *Collisions at Sea* (6th ed.), p. 442, the learned author, referring to the international rules to prevent collision and the use of the word "fairway," observes:

"Under the earlier Act there was considerable discussion as to the meaning of 'mid-Channel.' In the present Article 'fairway or mid-channel' would appear to mean the deep water channel navigable for heavy ships. It would seem that it is to the starboard side of the centre of such deep water channel that vessels, both those navigating within the deep water channel and those navigating in waters which, although outside of the deep water channel, are, however, comprised within the 'narrow channel,' must keep."

In the late revision of *Bouvier's Law Dictionary* by Rawle, he defines the word as one "used to indicate the middle and deepest or most navigable channel," and refers to the word "thalweg," from which it is apparently derived. The latter word, however, has reference more particularly to navigable channels as interstate and international boundaries. *Louisiana v. Mississippi*, 202 U. S. 1, 49. We conclude that appellant's contention rested upon this theory is not well founded, in view of the fact that it has not been shown in this case, in any event so that it can be determined as a matter of law, that this collision occurred in a "fairway." We are unable to see that respondent was violating any law of navigation in fishing near the middle of this large body of water.

It appeared during the course of the trial that respondent was fishing in the waters of Puget Sound without having procured a license therefor from the proper state authorities. It is not shown that he was otherwise violating any fishing regulations of the state or of the United States. It is contended, however, by counsel for appellant that his want of license from the authorities of the state prevents him recovering damages in this case regardless of the negligence of ap-

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pellant. This contention we think, finds its answer in the observation made in the recent decision of this court in *Switzer v. Sherwood*, 80 Wash. 19, 141 Pac. 181, where a similar contention was made against a claim of damages by a motor-cycle rider, he not having a license as the state law required. It was there said:

"Before the violation of the statute by the person injured will constitute a defense to the negligent act of the person injuring him, there must be shown some causal connection between the act involved in the violation of the statute and the act causing the injury. Here there was no such causal connection. The injury would have happened in the same manner it did happen had the respondent theretofore paid the license fee due the state and been in possession of the statutory license."

We are of the opinion that neither the question of appellant's negligence nor of respondent's contributory negligence can be determined as a matter of law. Both of these questions were properly left to the jury by the learned trial court.

The judgment is affirmed.

MORRIS, C. J., HOLCOMB, and CHADWICK, JJ., concur.

[No. 12389. Department One. April 20, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK ROSS
et al., *Appellants*.¹

CRIMINAL LAW—EVIDENCE—ADMISSIONS. In a prosecution for assault, declarations made by defendant on his arrest, tending to show intent or motive as to the offense charged, are admissible; and the fact that, interspersed through the conversation testified as had with the defendant, were probable references to feeling between him and other parties in the neighborhood would not constitute prejudicial error.

WITNESSES—CROSS-EXAMINATION. In a prosecution for assault, the action of the court, in excluding cross-examination of the state's witnesses as to charges made that the defendant's mother was a claim jumper was not error, inasmuch as it was the duty of the court to restrict cross-examination of witnesses to the issues involved in the case.

ASSAULT AND BATTERY — CRIMINAL PROSECUTION — DEGREES — INSTRUCTIONS. In a prosecution for assault in the second degree, under which the defendant might be convicted of assault in the third degree, defined as any assault not included in first and second degree assaults, an instruction defining all the degrees of assault, but expressly charging the jury that "defendant is not charged with assault in the first degree, and a definition of that offense is only given you that you may better understand the other degrees," was not prejudicial error.

SAME—SECOND DEGREE—EVIDENCE—SUFFICIENCY. A conviction of assault in the second degree is warranted, under Rem. & Bal. Code, § 2414, defining the offense as willfully inflicting grievous bodily harm upon another with or without a weapon, or as assaulting with a weapon or thing likely to produce bodily harm, where the evidence showed that defendant disarmed the prosecuting witness of his revolver, struck him across the jaw with something that felt like a slug of iron, that he had a cut under each eye which were swollen almost shut, that his jaw was severely swollen, and that there was a fracture of the nasal bone.

CRIMINAL LAW—APPEAL AND ERROR—REVIEW — FAILURE TO GIVE INSTRUCTIONS. Under art. 4, § 16, of the state constitution providing that "judges shall declare the law," and under Rem. & Bal. Code, § 2308, which provides that "every person charged with the commission of a crime shall be presumed innocent until the contrary is

¹Reported in 147 Pac. 1149.

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proved by competent evidence beyond a reasonable doubt," the inadvertence of the court in failing to instruct on the presumption of innocence is not prejudicial error, where no request had been made for such instruction, and the court gave a correct instruction as to reasonable doubt and the requirements of the prosecution in establishing a case.

CRIMINAL LAW—APPEAL AND ERROR—ASSIGNMENT OF ERROR. Alleged misconduct of counsel in argument to the jury, presented not by a stenographer's report or certificate of the judge, but by affidavits of opposing counsel on a motion for a new trial, which was denied by the judge in whose presence and hearing the incident complained of occurred, raises no question for review on appeal.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered November 8, 1913, upon a trial and conviction of assault. Affirmed.

Fred M. Bond, for appellants.

H. W. B. Hewen (*Geo. D. Abel*, of counsel), for respondent.

HOLCOMB, J.—The appellants were jointly charged with assault in the second degree, and each convicted of assault in the third degree; from which conviction, they appeal.

I. An error is assigned in that the court permitted the state to introduce testimony by a witness named Burke as to statements made to the witness by one of the defendants, Frank Ross, after the arrest of the defendants. Witness Burke assisted in the arrest of this defendant. On the return to the county seat, some conversation occurred between witness and Frank Ross concerning the prosecution and the matter for which they were being prosecuted. It is insisted by the appellants that the conversation was clearly prejudicial to their rights; in other words, that it conveyed the impression to the jury that defendants were having trouble over there with other people beside Mr. Bradley, the prosecuting witness, and no other conclusion could have been reached by the jury; and also conveyed the idea to the jury that defendants had threatened to commit a crime more

serious than that with which they were charged. We do not so consider it. The prosecution, by its questions, endeavored to elicit from the witness the conversation that occurred concerning the arrest and concerning the prosecution against the defendants, and the witness Burke apparently did not understand all of the questions. Interspersed through the conversation had with him were probably references to some controversy or feeling between them and other parties in the neighborhood, which, of course, were clearly improper and irrelevant, but were not gotten before the jury. But the purpose of the prosecution evidently was to show, by the conversation, admissions on the part of the defendants, or one of them, tending to show their guilt of the particular offense for which they were prosecuted; in other words, show what their intention or motive was. It is always proper for the prosecution to show the intent; and so far as being prejudicial is concerned, all evidence tending to show guilt of the accused is prejudicial. If it is not irrelevant, incompetent, or immaterial to the case, it is not erroneous. There was nothing admitted by the court that was improper or irrelevant, and therefore no prejudicial error was committed.

II. Error is also assigned as to the restriction of the cross-examination of witnesses Claud Venderpool, May Vanderpool, A. A. Bradley, and J. N. Howard. We perceive no error in the rulings of the court in regard thereto. As an example, witness May Vanderpool was asked if she had not claimed that Mrs. Ross (mother of defendants) jumped her claim out there, and if she (Mrs. Vanderpool) had not employed Mr. Abel in regard to that matter. There certainly was no error in excluding cross-examination as to this subject. It was the duty of the court to restrict cross-examination of witnesses to the issues involved in the case, either directly or reasonably collateral thereto, such as their bias and interest in the matter under consideration, and we think the court did not abuse its discretion in restricting the cross-examination of all the witnesses as to which error is as-

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signed. It is true that it is permissive to ask questions of witnesses tending to show their interest or prejudice against one of the parties, but the questions asked of these witnesses clearly went outside all direct or collateral issues in this case. The question of whether or not the Vanderpools or the Rosses were claim jumpers had no proper place in the trial of this case; continued reference thereto would have tended to obscure the real issues involved in the trial, and all such controversies should have been, and were, properly eliminated from the trial of the case.

III. Appellants urge that it was error for the court to instruct the jury defining the offense of assault in the first degree. The defendants were prosecuted for assault in the second degree, which, of course, includes, if the facts warranted, the lesser offense of assault in the third degree. The court in its instructions gave brief definitions based on the statutes of the offenses of assault in the first degree, second degree, and third degree; and further instructed the jury as follows:

"The defendant is not charged with assault in the first degree and a definition of that offense is only given to you that you may better understand the other degrees."

This instruction was proper to be given in the case, for the reason that the statute further provides that any assault not constituting assault in the first or second degree is an assault in the third degree. In order, then, for the jury to understand what would not be an assault in the first degree as well as what would not be an assault in the second degree, it was not improper for the court to give them a definition of assault in the first degree, thus distinguishing between assaults in the first and second degrees and assault in the third degree, of which defendants were convicted.

The appellants also contend that it was error for the court to instruct the jury as to assault in the second degree. They argue that a careful examination of the statement of facts clearly shows that there was no evidence at all warranting

the court in sending the case to the jury upon the theory that they had a right to convict of assault in the second degree. This contention, we assume, is based upon the theory that it was not definitely established at the trial of the case that the defendants, or either of them, used any deadly or dangerous weapon in the attack upon the prosecuting witness Bradley. It was alleged in the information that they "did then and there unlawfully and wilfully assault, strike, beat, wound, and inflict grievous bodily harm upon, one Bradley, with metal knuckles and clenched fists." The statute, Rem. & Bal. Code, § 2414, defines assault in the second degree, among other definitions, as follows:

"(3) Shall willfully inflict grievous bodily harm upon another with or without a weapon; or

"(4) Shall willfully assault another with a weapon or other instrument or thing likely to produce bodily harm."

The evidence on behalf of the prosecution was to the effect that the prosecuting witness Bradley, on the date alleged, was in a place where he had a right to be; that he was overtaken by defendants Frank Ross, Earl Ross, and another; that he was first insulted and called vile names, then disarmed, by defendant Earl Ross, of a revolver which was hung in a scabbard from his shoulder, and which he had not touched or attempted to use; and then first assailed by defendant Frank Ross, who struck him "across the jaw with something that felt more like a slug of iron than anything else;" that he was hit several "licks" afterwards, but could not really tell how many or by whom. Other witnesses for the prosecution testified that he had a cut under each eye, one of them about three-fourths of an inch or more long, and the other an inch or longer; that both his eyes were swollen almost shut, and that his jaw was severely swollen, the swelling extending down to the cords of his neck. A doctor, who examined him on the Thursday following the Sunday on which he was assaulted, found that he had black and blue areas about both eyes and some swelling about the

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left temple. There was a healed scar beneath each eye, overlying the lower edge of the orbit and extending about five-eighths of an inch on each side, and about half an inch below the margin of the lower lid, parallel with the lid edge. There was a fracture of the nasal bone on the left side and a separation of the right nasal bone from the cartilage. There is positively no question, if the jury believed this and other evidence on the subject produced by the state, but that they were amply warranted in finding that the defendant had, with such intent, inflicted grievous bodily injury upon the said Bradley, and that there was, therefore, ample evidence to justify the jury in finding defendants guilty of assault in the second degree instead of assault in the third degree, as they did find.

IV. An error is urged upon the failure of the court to instruct the jury that the law presumes the defendants innocent, and that this presumption of innocence remains with the defendants throughout the whole trial and until said presumption of innocence is overcome by the state by competent evidence beyond a reasonable doubt; and that this is true even though the defendants do not request the same, this duty being provided for by law. It is urged that § 16, art. 4 of the constitution of the state of Washington, which reads: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law;" and the statute of 1909, Rem. & Bal. Code, § 2308, as follows: "Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been proved against him, and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest;" render it the imperative and mandatory duty of the court in all criminal cases to instruct the jury as to the presumption of innocence. Cases from other jurisdictions are cited to sustain this contention: *People v. Potter*, 89 Mich. 353, 50 N. W.

994; *Territory v. Nichols*, 3 Johnson's (N. M.) 76, 2 Pac. 78; *State v. Cody*, 18 Ore. 506, 23 Pac. 891, 24 Pac. 895; *People v. De Fore*, 64 Mich. 698, 31 N. W. 585, 8 Am. St. 863; *People v. Murray*, 72 Mich. 10, 40 N. W. 29; *State v. Banks*, 73 Mo. 592.

There is no doubt whatever that, had this instruction been requested, it would have been the duty of the court to give the instruction, and error for him to refuse it. This court, in *State v. Myers*, 8 Wash. 177, 35 Pac. 580, held that, in a case where the accused fails to testify in his own behalf, it is the duty of the court under the statute, without an affirmative request therefor, to charge that no inference of guilt should arise against the defendant on account thereof; reaffirming the decision of the court in *Linbeck v. State*, 1 Wash. 336, 25 Pac. 452. This case has been recently reaffirmed in the case of *State v. Hanes*, 84 Wash. 601, 147 Pac. 193. In referring to the cases of *Linbeck v. State* and *State v. Myers*, *supra*, Chadwick, J., said it was there held "that this statute [requiring the court to instruct the jury that no inference of guilt shall arise if the accused shall fail or refuse to testify in his own behalf] is mandatory and that it is the duty of the trial judge to so instruct the jury; that a failure to do so is reversible error. An engaging and persuasive argument is made by the prosecuting attorney in which we are asked to overrule our former holdings. If the matter were an original question we would be inclined to consider some of the reasons urged in support of his argument. The cases cited followed the letter of the statute, which says, 'It shall be the duty'." In the case at bar, the appellants requested no instruction as to the presumption of innocence of defendants, and the omission to give such instruction was not called to the attention of the trial court until the exceptions were filed and reasons urged for a new trial. The trial court instructed the jury as follows:

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"The burden is on the state of proving every fact material and necessary to a conviction by competent evidence beyond a reasonable doubt. It is not sufficient that the state should prove these facts by a mere preponderance of testimony, nor on the other hand is it necessary that they should be proved conclusively in such a manner as to leave room for no doubt whatever."

We admit that the question presented is one of some nicety and importance. In *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, Fullerton, J., passing upon the question, where the appellant especially requested the court to instruct the jury on the law relating to the presumption of innocence and the court refused so to do, said:

"This was error. The accused is entitled in every instance to an instruction on the presumption of his innocence. The court need not, of course, give the instruction in the language of the request unless it so desires; but when requested to instruct as to the presumption of innocence, it should comply therewith in some form, such as will correctly inform the jury as to the law pertaining thereto."

The authorities seem to be unanimous that, where such an instruction is requested, it is error to fail or refuse to give it, and with those authorities we concur. But the general rule now is, except in cases where there are specific provisions of the statute which are mandatory upon the court, as in the case under our statute, of instructing the jury as to the failure of the defendant to testify in his own behalf, that, subject to a few statutory innovations, "mere *non-direction*, partial or total, is not ground of new trial, unless specific instructions, good in point of law and appropriate to the evidence, were requested and refused. Thompson, *Trials* (2d ed.), § 2841; *State v. Parsons*, 44 Wash. 299, 87 Pac. 349, 120 Am. St. 1008; *People v. Graney*, 91 Mich. 646, 52 N. W. 66; *People v. Smith*, 92 Mich. 10, 52 N. W. 67; *People v. Ostrander*, 110 Mich. 60, 67 N. W. 1079; 12 Cyc. 621; 22 Am. & Eng. Ency. Law (2d ed.), 1281; 11 Ency. Plead. & Prac., 354.

Ordinarily a charge in a criminal case should contain instructions upon the subject of the presumption of innocence and reasonable doubt. It can hardly be doubted, however, that in this case the omission to instruct as to the presumption of innocence was inadvertent, and had counsel suggested the subject or the omission, the trial judge would doubtless have given such instruction. In a recent Michigan case, *People v. Yund*, 163 Mich. 504, 128 N. W. 742, the court say:

“A premium should not be placed on the practice in this case. Counsel owe it to the trial judge to be attentive to the charge and suggest corrections where respondent’s rights are injured by it. Especially is this true where the rule is as well understood as in these particulars. Again, while an exception need not be taken to misstatements of law in the charge, it is usually necessary where the fault consists of an omission. It is only fair to the public and to the trial judge. . . .”

So in this case the counsel owed some duty to the court, and we do not approve of counsel in a case sitting by inert and permitting the court to commit an inadvertent error which, by the slightest and simplest suggestion could be cured before the jury received the case. If we are to consider every inadvertent error of omission or even of commission committed by the court as necessarily prejudicial and ground for the reversal of the case, it will soon become so that an appeal to this court will be little else than a trial of the trial court, and the real merits of the case in controversy will escape attention. Certainly it is the duty of the trial court to see that the accused in a criminal case has a fair and impartial trial. While we would not approve of the deliberate omission of the instruction as to presumption of innocence in a criminal case, we will not, for mere nondirection, where no such instruction was requested and where the court gave a correct definition and instruction as to reasonable doubt and the requirements of the prosecution in establishing a case, hold that such nondirection is prejudicial error. *People v.*

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Yund, supra; *State v. Kennedy*, 154 Mo. 268, 55 S. W. 293; *State v. Stewart*, 52 Wash. 61, 100 Pac. 153; 2 Thompson, Trials (2d ed.), § 2341. The instructions as a whole were full and clear and as favorable to defendants as could be required. We do not believe that the omission complained of, in view of the instruction given as to reasonable doubt, in any way affected the result, or, in this instance, prejudiced the right of the defendants to a fair and impartial trial.

V. An error is assigned upon the allowance by the court of argument by the special counsel for the state to the jury, that defendants had not introduced any evidence of good character because their witnesses had not heard any one say anything about defendants being peaceable, law-abiding citizens. It is alleged in affidavits, made by each of the counsel for appellants after the trial of the case on a motion for a new trial, that, at the time these remarks were made in argument by counsel for the state, they were objected to by defendants, and that the court refused to interfere in the matter; and it is also urged that other improper and prejudicial remarks were made by counsel for the state, which were objected to and no exclusion thereof made by the court. These matters were included in the statement of facts by copies of the affidavits relating thereto, which, as stated, were filed after the trial by counsel for the appellants. We think the matters here urged are ruled by the decision of this court in *State v. Johnston*, 83 Wash. 1, 144 Pac. 944. In that case, the court, per Ellis, J., say:

"It is true that a copy of an affidavit of one of the attorneys for the appellant appears in the statement of facts in which he sets out what he claims to be the substance of the objectionable statements, . . . Whatever the true purport of the incident complained of, it occurred in the immediate presence and hearing of the trial court. What actually occurred was a matter peculiarly within the knowledge of the trial judge. Either a stenographic report of the argument or a statement of the trial judge as to what was its purport, would have given it to us from an authentic source.

It would have been easy to have preserved the language in context, either by the court stenographer, or by a request that the judge reduce it to writing in such form that he could certify it as the substance and connection of what was actually said. The case falls directly within the rule announced in *Maryland Casualty Co. v. Seattle Elec. Co.*, 75 Wash. 480, 134 Pac. 1097, and followed in *Loy v. Northern Pac. R. Co.*, 77 Wash. 25, 137 Pac. 446."

See, also, *State v. Jakubowski*, 77 Wash. 78, 137 Pac. 448; *State v. McGonigle*, 14 Wash. 594, 45 Pac. 20; *State v. Poyner*, 57 Wash. 489, 107 Pac. 181.

In the case at bar, these affidavits were not controverted by the state by counter affidavits, but the court, in the face of these affidavits, denied a motion for a new trial. We may, therefore, infer that he, knowing what actually occurred at the time of the trial, passed on the alleged facts therein contained adversely to them. Viewing the matter from whatever angle we may, we fail to find a sufficient predicate in the record to sustain the claim of prejudicial misconduct. *State v. Johnston, supra*.

VI. Lastly, it is claimed by the appellants that the trial court should have granted a new trial, and that the verdict of the jury was clearly against the weight of the evidence. With this contention we do not agree. We have carefully examined the record of the evidence in the case and, without specially alluding to any of it, we simply state that we consider the evidence amply sufficient to warrant the jury, if they believed it, in finding defendants guilty of one of the degrees of assault charged. The verdict of the jury and the punishment assessed by the court were lenient.

We find no prejudicial error in the record, and the judgment is affirmed.

MORRIS, C. J., MOUNT, and PARKER, JJ., concur.

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[No. 12401. Department Two. April 20, 1915.]

A. J. SPECKERT, *Appellant*, v. REGINE M. SPECKERT,
Respondent.¹

APPEAL AND ERROR—RECORD—STATEMENT OF FACTS. Where the evidence in a cause on appeal has not been brought up by bill of exceptions or statement of facts it will not be considered.

APPEAL AND ERROR—RECORD—STATEMENT OF FACTS—STIPULATION OF PARTIES. A purported stipulation of counsel that no statement of facts nor bill of exceptions need be filed is not established by the production of correspondence which indicates only that they endeavored to agree upon portions of the files to be included in the transcript, no reference being made to any statement of facts or bill of exceptions.

APPEAL AND ERROR—RECORD—AFFIDAVITS. Affidavits incorporated in a transcript, but not made part of the record by statement of facts or bill of exceptions, will not be considered on appeal.

APPEAL AND ERROR—RECORD—ABSTRACT. An appeal should be dismissed for want of a proper abstract of record, where the one offered is substantially a copy of the transcript without abbreviation or condensation, and fails to disclose that it had ever been filed in the superior court.

Appeal from an order of the superior court for King county, Frater, J., entered June 12, 1914, adjudging a contempt for failure to comply with an order directing the payment of alimony. Appeal dismissed.

A. J. Speckert, for appellant.

Frank A. Paul, A. J. O'Connor, and Hastings & Stedman, for respondent.

CROW, J.—Plaintiff and defendant were formerly husband and wife. On March 23, 1907, the plaintiff was granted a decree of divorce from defendant, by the superior court of King county. The parties had two minor daughters whose custody was awarded to the defendant, and it was further decreed that the plaintiff, until the further order of the court,

¹Reported in 147 Pac. 1141.

should pay the defendant, on the first day of each and every month, the sum of \$30 as alimony for the support, maintenance, and education of the minor daughters. Plaintiff himself alleged that this sum would be proper and reasonable for such purpose. At some date prior to April 1, 1912, the defendant applied to the superior court for an order adjudging plaintiff in contempt for the failure to pay in accordance with the decree. On that day the trial judge sent the cause to a referee with authority to summon witnesses, hear testimony, examine records and documents, and take an accounting. A report of the referee was approved on May 24, 1912, it being then found that defendant was entitled to \$810.68, as overdue and unpaid alimony from March 23, 1907, to April 23, 1912. Thereupon an order was entered on June 7, 1912, directing plaintiff to pay \$250 to defendant on or before June 14, 1912. In addition thereto he was ordered to pay \$44.60 costs, and to pay back and current alimony at the rate of \$60 per month, \$30 to apply each month on back alimony and \$30 on current alimony. No appeal was taken from this order. On April 14, 1914, Frank A. Paul, one of defendant's attorneys, filed an affidavit, in which it was alleged that the plaintiff had not made the payments as directed. The affidavit in part contained the following allegations:

"That the plaintiff has not made sufficient payments, since the entry of the said order of June 7, 1912, to keep up the current monthly alimony of \$30; that on January 31, 1913, the plaintiff was delinquent in the sum of \$1,069.18, of which \$39.60 was for costs, which said balance was acknowledged by the plaintiff to affiant to be correct; that \$150 accrued between February 1, 1913, and June 30, 1913, making a total of \$1,219.78; that against this total payments aggregating \$55 on alimony and \$5 on costs were made in February and March, 1913, reducing the total on June 30, 1913, to \$1,159.78, of which \$1,125.18 was on alimony and \$34.60 on costs; and that this balance was likewise acknowledged to be correct by the plaintiff;

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"That since June 30, 1913, there has accrued under the said decree ten months' alimony, in the sum of \$300, at \$30 per month, up to and including April, 1914; that no part of this has been paid; that the costs have been reduced from \$34.60 to \$14.60 by the payment of \$20, on account of costs, in July, 1913; that no part of the said balance of \$14.60 due on old costs has been paid, although the plaintiff issued two checks for \$5 each, drawn on his account at the Northern Bank & Trust Company, Seattle, in pretended part payment of the said costs, one on July 31, 1913, and the other on August 4, 1913; . . .

"That the plaintiff is a strong, able-bodied man, a practicing attorney, regularly engaged in practice; that as a side line, the plaintiff lectures on the subject of "Spiritualism" and conducts marriages, funerals, and christenings, for cash fees, among people of the "Spiritualist" persuasion; that plaintiff has confided to affiant that these collateral activities are remunerative to plaintiff; that affiant has reason to believe that the plaintiff can well afford to pay back the accumulated back alimony and pay the current and accruing alimony and costs, but that he refuses to do so because of hatred of his former wife, the defendant herein, a hatred not lessened by reason of plaintiff's subsequent marriage to his present wife;

"That this affidavit is made in support of an application for a show-cause order, citing the plaintiff to show cause why he should not be punished for failure to pay alimony, in accordance with this court's decree of March 23, 1907, and of June 7, 1912."

Upon this affidavit a show-cause order was issued and personally served upon plaintiff by defendant's attorney. Plaintiff interposed a motion to dismiss, a demurrer, and an answer, the burden of his contention being, (1) that the court had obtained no jurisdiction over him, because the show-cause order had been served by defendant's attorney and not by the sheriff or any other public officer; (2) that the two daughters of plaintiff and defendant have arrived at the age of majority, and that plaintiff cannot be held for further payment on their account; and (3) that the affidavit on which the show-cause order was issued failed to state suffi-

cient facts, as it did not allege that plaintiff was financially able to pay. After several preliminary hearings and interlocutory orders, the trial judge made an order requiring plaintiff to pay the defendant or her attorneys \$50 on account of back alimony, within ten days, or that he be imprisoned not less than five nor more than ten days, for contempt of court. Plaintiff interposed a motion to vacate this order, which after hearing was overruled. Plaintiff failed and refused to make the payment of \$50. Thereupon an order was issued for his arrest, and he has appealed.

The record is in an unsatisfactory condition, being so hopelessly incomplete and confusing that it is of but little, if any, assistance to this court in attempting to pass upon the appeal. It appears without dispute: (1) That appellant is badly in arrears for unpaid alimony which accrued before either of his daughters arrived at the age of majority; (2) that appellant is a practicing attorney and otherwise employed as stated in the affidavit of respondent's attorney; (3) that appellant has utterly failed to show his inability to pay the \$50 on account of alimony which the trial court ordered him to pay; (4) that he continuously delayed the proceedings herein by technical objections and every possible method; and (5) that he has been able to give a supersedeas bond and prosecute this appeal at an expense which must largely exceed the payment which the trial court ordered him to make.

Respondent has moved to dismiss the appeal. The first ground of her motion which we will consider is that no bill of exceptions or statement of facts has been prepared, served, filed, or certified. In so far as we are able to comprehend the contentions made by appellant, it is apparent that, in their final analysis, they involve questions of fact which must be determined upon evidence. The orders of the trial court, including the final order, were made after hearing evidence. There has been no attempt to prepare, propose, file, or serve a statement of facts. Appellant seeks to excuse

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himself for this omission by contending that respondent's attorney stipulated that no statement of facts or bill of exceptions need be filed, and produces certain correspondence between himself and respondent's attorney which he contends discloses such an agreement. The correspondence mentioned, which has been brought before us in affidavits filed by appellant to resist the motion to dismiss, fails to sustain his contention. Passing the question whether the parties could agree to have an appeal of this character heard without any statement of facts, bill of exceptions or any stipulation as to the facts, the letters indicate that appellant and respondent only endeavored to agree upon portions of the files to be included in the transcript, there being no reference to any statement of facts or bill of exceptions. Appellant has incorporated in his transcript affidavits which were filed in the superior court during the course of the proceedings. As none of these affidavits has been made a part of the record by statement of facts or bill of exceptions, they cannot be considered.

Respondent further moves to dismiss the appeal for the want of a proper abstract. The only abstract which appellant has attempted to prepare is substantially a copy of the transcript without abbreviation or condensation. It is of no assistance to this court, and was not filed until long after the filing of appellant's opening brief. It seems to have been then filed in this court, and fails to disclose that it was ever filed in the superior court.

For the want of any statement of facts or bill of exceptions, and for want of a proper abstract, the appeal is dismissed.

MORRIS, C. J., ELLIS, MAIN, and FULLERTON, JJ., concur.

[No. 12444. Department Two. April 20, 1915.]

COMMERCIAL BINDERY & PRINTING COMPANY, *Appellant*, v.
TACOMA TYPOGRAPHICAL UNION No. 170 *et al.*,
Respondents.¹

INJUNCTION—PROTECTION OF PERSONAL RIGHTS—STRIKES—INTERFERENCE WITH EMPLOYEES. In an action for injunctive relief against a printer's union to prevent interference with plaintiff's employees, who had taken the place of striking employees, a permanent injunction after a trial on the merits is properly denied, where the strike leader, who was inciting the strikers to acts of intimidation and was himself guilty of assault, had left the state and thereafter there had been no acts of violence and intimidation, for a period prior to suit and up to the trial, and there was no showing in the evidence of any reasonable probability of further interference.

INJUNCTION—PROTECTION OF PERSONAL RIGHTS—INTERFERENCE WITH EMPLOYEES. The destruction of one's business through the intimidation of employees while in their employment is as much the subject of injunctive relief as is the destruction of physical property.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered June 30, 1914, dismissing an action for injunctive relief, after a trial on the merits to the court. Affirmed.

A. O. Burmeister and Blackburn & Gielens, for appellant.

Thomas J. Wayne and Teats, Teats & Teats, for respondents.

MAIN, J.—The purpose of this action was to secure injunctive relief. After a trial upon the merits, the prayer of the complaint for a permanent injunction was not granted, and the action was dismissed. The plaintiff appeals.

The facts are substantially as follows: During the first two weeks of the month of December, 1913, the employees of the appellant refused to continue that employment because of disagreement over the wage scale to be paid. At about the

¹Reported in 147 Pac. 1143.

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same time, the employees of a number of other printing establishments in the city of Tacoma refused to work for the same reason. After the employees of the appellant company had gone on the strike, it secured other employees who entered its service. The striking employees were all members of the Tacoma Typographical Union No. 170. After the strike had been declared, one Charles S. Brown was sent from Cincinnati, Ohio, by the executive council of the International Typographical Union, to Tacoma, for the purpose of taking charge of the strike. After Brown reached Tacoma, he had a number of conferences with the manager of the appellant company looking towards an adjustment of the difficulty, Brown seeking to induce the employers to accede to the wage scale demanded by their former employees when they refused longer to work. The employers were refusing to meet the scale demanded. On or about April 1, 1914, Brown told the manager of the appellant company that unless their demands were acceded to, the company would not be able to stand the pressure that would be brought to bear upon it "in the way of rough stuff."

Soon after this date, at about 5 o'clock in the afternoon, under the direction of Brown, the striking employees and others would assemble at the entrance of the appellant's place of business, and wait until the nonunion men then employed would come out upon the street after their day's work had ceased. When these employees would come out, those who were then out upon the strike from the various printing establishments would surround them as they walked along the sidewalk, seek to jostle them, and to engage them in conversation. According to the evidence introduced on the appellant's behalf, the nonunion employees were threatened and called vile names. This condition of affairs continued practically daily until about the 15th of May, 1914. On the evening or night of the 14th of May, one Jones, a nonunion employee of the appellant company, was assaulted by some one, the evidence does not show by whom. On the 15th, or

the day after the assault, Jones caused Brown to be arrested upon the charge of assault. Brown gave a bond for his appearance, and thereafter left the state, forfeiting his bond. The complaint in the present action was filed on the 20th day of May, 1914, and a temporary restraining order was issued on the following day. This order was issued without notice. After the temporary restraining order was served, a number of the defendants answered. On June 21, in response to the show-cause order which was contained in the restraining order, the defendants appeared in court. Thereupon the cause was tried on its merits, and resulted in a judgment of dismissal.

The principal question is whether the trial court erred in refusing to grant a permanent injunction after the trial upon the merits. Brown, under whose direction the strike was conducted, had departed from the state prior to the time when the present action was instituted. Throughout the testimony, constant reference is made to his conduct while in charge of the strike. No complaint is made as to the conduct of the striking employees prior to the time Brown came to Tacoma. The evidence does not show that the acts above detailed occurring prior to May 15th, were continued after that date, that being the time of Brown's arrest upon the charge of assaulting Jones. The acts complained of being directly under the charge and direction of Brown, and not having existed before he came to take charge of the situation, nor after he departed from the state, there does not appear from the evidence any reasonable probability of further interference. If the acts complained of had continued up to the time of the institution of the present suit, or, if at the time of the trial there had been any reasonable probability that the same conduct would be continued, an entirely different question would be presented. To destroy a business is not different from the destruction of physical property. If employees may be intimidated while in their employment, the business of the employer may be destroyed. It is as much the

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duty of the court to restrain conduct which will have the effect of destroying the business as it is to prevent the destruction of physical property.

The judgment will be affirmed.

MORRIS, C. J., ELLIS, CROW, and FULLERTON, JJ., concur.

[No. 12468. Department Two. April 20, 1915.]

A. B. CROSIER, *Appellant*, v. EDWARD CUDIHEE, *Sheriff of King County, et al., Respondents*.¹

CONSTITUTIONAL LAW—LIENS—CONDITIONAL SALE CONTRACTS—MECHANICS' LIENS—PRIORITIES—STATUTES. Rem. & Bal. Code, § 1156, which provides that "every person who is in possession of a chattel, under an agreement for the purchase thereof, whether the title thereto be in him, or his vendor, shall for the purposes of this act [Id., § 1154], be deemed the owner thereof, and the lien of a person expending material, labor or skill thereon shall be superior to and preferred to the rights of the person holding the title thereto," is not unconstitutional as preferring mechanics' liens over the interest of the vendor under a conditional sale contract, nor as being a deprivation of one's property without due process of law.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—ACTIONS. One who is in court seeking to enforce the validity of his vendor's lien as against a mechanics' lien is not in a position to urge that he has been deprived of his property without due process of law.

PARTNERSHIP—FICTITIOUS NAME—COMPLIANCE WITH STATUTE—OBJECTIONS. The objection that a partnership, doing business under an assumed name, cannot maintain an action because it had failed to file with the county clerk the designation of the firm, with the names of all the partners, as required by Rem. & Bal. Code, § 8369, goes only to the capacity to sue, and is waived if not raised by demurrer or answer.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 6, 1914, upon findings in favor of the defendants, in an action to enjoin the sale of chattels and to cancel liens thereon, tried to the court. Affirmed.

¹Reported in 147 Pac. 1146.

Penrose L. McElwain, for appellant

James G. Combs, for respondents.

MORRIS, C. J.—Defendant O. M. Crosier, between May 26, 1913, and October 21, 1913, was in possession of two automobiles, under conditional sale contracts evidencing the terms of their purchase from appellant. These contracts were duly filed for record. During this period of time, respondents Crossett, at the request of O. M. Crosier, furnished material and labor in the repairs of the automobiles amounting to \$576.50, for which four liens were filed. In November, 1913, proceedings were commenced to foreclose these liens, when appellant commenced this action against the sheriff and the Crossetts, seeking to cancel the liens and restrain the sale of the automobiles. The Crossetts appeared, setting up the liens, and, by way of cross-complaint, asked for their foreclosure. The lower court found in favor of the Crossetts under the cross-complaint, and decreed a foreclosure of the liens. A. B. Crosier appealed.

The pertinent statutes are Rem. & Bal. Code, §§ 1154, 1156:

"1154. Every person, firm or corporation who has expended labor, skill or material on any chattel, at the request of its owner, or authorized agent of the owner, shall have a lien upon such chattels for the contract price for such expenditure, or in the absence of such contract price, for the reasonable worth of such expenditure, for a period of one year from and after such expenditure, notwithstanding the fact that such chattel be surrendered to the owner thereof: provided, however, that no such lien shall continue after the delivery of such chattel to its owner as against the rights of third persons who may have acquired an interest in, or the title to, such chattel in good faith, for value, and without actual knowledge of the lien."

"1156. Every person who is in possession of a chattel, under an agreement for the purchase thereof, whether the title thereto be in him, or his vendor, shall for the purposes of this act, be deemed the owner thereof, and the lien of a

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person expending material, labor or skill thereon shall be superior to and preferred to the rights of the person holding the title thereto, or any lien thereon antedating the time of expenditure of the labor, skill or material thereon by a lien claimant, to the extent that such expenditure has enhanced the value of such chattel."

Appellant contends that § 1156 (P. C. 309 § 167), is unconstitutional in that it prefers liens of this character over any prior security held by a vendor, and grants a lien against the interest of the vendor when, as here, such interest is evidenced by a conditional sale contract. It is also asserted that the effect of the statute deprives appellant of his property without due process of law. Appellant cites no direct authority supporting his contention, and we find none. We cannot recall any rule of law which would make this statute unconstitutional. Statutes establishing priorities as between liens are not uncommon, and such statutes have never been successfully attacked because liens of this character have been granted priority over vendors', mortgagors' and other liens. The fact that appellant is in court seeking the validity of his lien against that of respondents is a sufficient answer to his contention that he has been deprived of his property without due process of law.

A second contention is that respondents Crossett were doing business under an assumed name without complying with Rem. & Bal. Code, §§ 8369-8373 (P. C. 377 §§ 21-29), requiring that when persons are doing business under a name other than their true name, a certificate shall be filed in the office of the county clerk showing the name under which such business is to be conducted, and the true name of all persons engaged therein, and providing further that the failure to comply with such requirements shall prevent the maintaining of any suit in the courts of this state. This contention is without merit. While other reasons may suggest themselves, based upon the fact that respondents were brought into court to answer the suit of appellant, it is sufficient to say that this

objection can only be raised by demurrer or answer, which was not done. *Hale v. City Cab, Carriage & Transfer Co.*, 66 Wash. 459, 119 Pac. 837.

The judgment is affirmed.

Crow, Ellis, Main, and Fullerton, JJ., concur.

[No. 12371. Department One. April 22, 1915.]

L. A. MERRICK, as *Trustee, Appellant*, v. R. E. PATTISON
et al., Respondents.¹

FRAUDULENT CONVEYANCES—ACTIONS—EVIDENCE—SUFFICIENCY. In an action by a trustee in bankruptcy for an insolvent corporation seeking to be decreed the owner of certain realty, on the assumption it had been held in trust for the bankrupt by one of its officers and subsequently conveyed away by the latter, a finding that the defendants had acquired the property in good faith is sustained by evidence that the property was worth \$2,000 or less; that the defendants gave in consideration therefor \$2,170 by cancelling a past due note, which with interest amounted to \$1,050, and assuming a mortgage and taxes on the property aggregating an additional \$1,120, that there was nothing of record suggesting that the bankrupt had an interest in the property, that the defendants had no actual notice of any such interest, nor any knowledge that would have put them on inquiry.

LIS PENDENS—FILING OF NOTICE—EFFECT—SUBSEQUENT RECORD OF INSTRUMENTS. Under Rem. & Bal. Code, § 243, which provides that a *lis pendens* notice shall, from the time of the filing only, "be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action," delay in recording a conveyance until after the filing of a *lis pendens* notice would not affect the substantive rights of the parties in the property in controversy; since the statute is merely a law of procedure, and goes no further than to make the decree, if ultimately rendered in favor of the plaintiff, effective against one whose conveyance is recorded after the filing of the *lis pendens*, "to the same extent as if he were a party to the action."

¹Reported in 147 Pac. 1137.

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FRAUDULENT CONVEYANCES — BONA FIDE PURCHASER — CONSIDERATION. One is a purchaser of real estate in good faith and for value, although part of the consideration may have been for a preexisting debt, where the balance of the consideration was the assumption of a mortgage debt and taxes on the property, which was a new consideration.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered April 25, 1914, upon findings in favor of the defendants, in an action for equitable relief, tried to the court. Affirmed.

C. H. Graves, for appellant.

Coleman & Fogarty, for respondents.

PARKER, J.—This action was originally commenced in the superior court for Snohomish county by the plaintiff, as trustee in bankruptcy of the Donovan-Pattison Realty Company, against Fred O. Pattison and wife. The plaintiff sought to be decreed the owner of lots 3, 4 and 5, block 772, plat of Everett, division H, as against the defendants Fred O. Pattison and wife. The lots having been conveyed by Fred O. Pattison and wife to R. E. Pattison before the commencement of this action, which conveyance was not recorded in the office of the auditor of Snohomish county until thereafter, R. E. Pattison and wife intervened as defendants, and the controversy thereafter became one between them and the plaintiff. The trial resulted in findings and decree denying to the plaintiff the relief prayed for, and in effect decreeing the title of R. E. Pattison and wife, the intervening defendants, to be superior to the claims of the plaintiff. From this disposition of the cause, the plaintiff has appealed to this court.

The Donovan-Pattison Realty Company is a corporation organized under the laws of this state, and, prior to the time it was adjudged a bankrupt, it was engaged in the real estate business, buying and selling real property for itself and as agent for others. Fred O. Pattison, one of the

original defendants in this action, participated in the active management of the affairs of the corporation as one of its trustees. On June 18, 1912, the corporation conveyed certain of its property in exchange for other property. Among the property given in consideration of the conveyance of the property by the corporation was the property here involved, which property the corporation caused to be conveyed to Fred O. Pattison by one of the parties it dealt with in making the exchange. This deed of conveyance was duly recorded in the office of the auditor of Snohomish county soon thereafter. It is claimed that the corporation caused this conveyance to be made to Fred O. Pattison in lieu of the payment to him of certain moneys it held in trust for him, which were the proceeds of the sale of property it had held in trust for him. This is one of the disputed facts in the case, which, however, in view of our conclusions, is of no particular importance here. The corporation was insolvent at the time of making all of these conveyances in connection with this exchange of property, and it was formally adjudged a bankrupt on August 30, 1913, when appellant became its trustee in bankruptcy.

There is nothing in the record before us tending to show that the legal title to the property here involved was ever in the corporation, nor is there any record evidence that it made any claim of title, legal or equitable, to the property until the filing of the notice of the pendency of this action. We proceed upon the assumption that appellant's claim to the property as trustee in bankruptcy rests wholly upon the theory that Fred O. Pattison received the legal title thereto in trust for the corporation when it was conveyed to him in connection with the exchange of property between the corporation and those it then dealt with.

On October 1, 1913, Fred O. Pattison and Ella Pattison, his wife, conveyed the property here involved to respondent, R. E. Pattison. On October 9, 1913, this action was commenced, and on the same day notice of its pendency was duly

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filed for record in the office of the auditor of Snohomish county in compliance with Rem. & Bal. Code, § 243 (P. C. 81 § 173). On October 14, 1913, the deed of conveyance from Fred O. Pattison and wife to R. E. Pattison was duly filed for record in the office of the auditor of Snohomish county. Thereafter, R. E. Pattison and wife voluntarily became parties defendant in this action by intervention, and thereafter the cause proceeded to trial and final determination in the superior court as a controversy between them and the appellant. The trial court found, touching the good faith of R. E. Pattison and wife in the purchase of the property and the consideration then given by them therefor, as follows:

“(12) . . . the consideration for said transfer was the payment and satisfaction of an existing debt payable by F. O. Pattison and Ella Pattison to R. E. Pattison, evidenced by a note for one thousand dollars dated July 2, 1912, with accrued interest amounting to over fifty dollars, and the assumption and agreement on the part of the said R. E. Pattison and Eclista Pattison, his wife, to pay two mortgages upon said property aggregating the sum of ten hundred fifty dollars, together with taxes and street assessments amounting to the sum of about seventy dollars. . . .

“(13) That at the time of said purchase set forth in finding XII, interveners had no knowledge and information that the above named plaintiff claimed any right, title, or interest whatever in or to said real estate or any part thereof, and that on said date of said purchase the said R. E. Pattison and Eclista Pattison, in good faith and for the consideration set forth in finding No. XII, purchased said premises, . . .”

These findings were duly excepted to by counsel for appellant. The court made no specific finding as to the value of the property at that time, but the evidence clearly warrants the conclusion that it was worth approximately \$2,000. The evidence also clearly shows that the debt evidenced by the note mentioned in the above quoted finding as being satis-

fied by the conveyance to respondents and part of the consideration therefor was then past due.

It is contended by counsel for appellant that the evidence does not warrant the making of the findings above quoted touching the good faith of the respondent in purchasing the property from Fred O. Pattison and wife, and the consideration therefor. A painstaking review of the evidence convinces us that it preponderates in favor of these findings. Respondent R. E. Pattison is the father of Fred O. Pattison, one of the original defendants. This is about the only fact suggesting inquiry into the motives and good faith of the respondent in purchasing the property. It seems quite clear to us, however, as it evidently did to the trial court, that neither of the respondents had any connection whatever with the Donovan-Pattison Realty Company; that there was then nothing of record suggesting that the Donovan-Pattison Realty Company ever had the least interest, legal or equitable, in the property; that neither of the respondents had any actual notice of any such interest; that they had no knowledge that would have suggested inquiry as to any such possible interest; that the \$2,170, which they in effect paid for the property by cancellation of the debt due them from Fred O. Pattison and wife and the assumption of the mortgages and taxes against the property was all the property was then worth. Indeed, the testimony of the apparently disinterested witnesses, as to the value of the property at that time, seems to indicate that it was worth even less than this amount.

It is contended in appellant's behalf that the commencement of this action and the filing of the notice of the pendency thereof in the office of the auditor of Snohomish county, before the recording therein of respondents' deed from Fred O. Pattison and wife, rendered appellant's claimed right to the property superior to that of respondents under their deed. This contention is rested upon the provisions of Rem.

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& Bal. Code, § 243 (P. C. 81 §173), which, so far as necessary to be here noticed, reads as follows:

"In an action affecting the title to real property the plaintiff, at the time of filing the complaint . . . may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in that county affected thereby. From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed *or subsequently recorded* shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action. . . ."

We have italicized the words particularly relied upon by counsel for appellant, who seems to proceed upon the theory that the *lis pendens* notice had the effect of making respondents purchasers of the property, in legal effect, subsequent to and with notice of the claimed rights of appellant, for all purposes. We are unable to so view the effect of a notice of *lis pendens under this statute*. This, we think, is only a law of procedure, enacted with a view of making a decree of the nature here sought, if ultimately rendered in favor of the plaintiff, effective, not only against the original defendant in the action, but also effective against one who purchases the property or whose conveyance evidencing such purchase is recorded after the filing of the notice of pendency of the action, "*to the same extent as if he were a party to the action.*" In other words, the statute, and a notice of *lis pendens* filed in pursuance thereof, has the effect of constructively making the one claiming under such subsequently executed or recorded conveyance a party to the action. It does not follow that a decree must necessarily be rendered in favor of the plaintiff because his notice of *lis pendens* is prior in time to the recording of a conveyance of a purchaser.

Such purchaser is not thereby prevented from asserting his claimed rights as against the claims of the plaintiff and having the same determined upon the merits. Such rights may or may not be superior to those claimed by the plaintiff. The notice of *lis pendens*, as we view it, has no practical effect on the substantive rights of the respective parties, but is only a method of forcing a purchaser, under a subsequently recorded conveyance, to set up his claim of right in that action or have the decree therein, which may be rendered in favor of the plaintiff, made effective against him as well as the original defendant. It seems to us that this problem has been solved in respondents' favor by the decision of this court in *Eldridge v. Stenger*, 19 Wash. 697, 54 Pac. 541, where Judge Anders, speaking for the court touching the effect of a notice of *lis pendens* under this statute, there being involved conflicting claimed rights to be determined as a question of priority, said:

"It will be borne in mind that the notice in this instance was filed prior to the recording of appellant's deed, and it is insisted by counsel for the respondents that this statute precludes the appellant from claiming any interest in the premises in dispute. It is asserted that under the statute the plaintiff cannot occupy any attitude other than that of a subsequent purchaser, and that is manifestly true; but the provision that such subsequent purchaser shall be bound by the proceedings to the same extent as if he were a party to the action must also be considered in construing the statute. Now, conceding that Mrs. Eldridge was a subsequent purchaser, in contemplation of this statute, and bound to the same extent as if she had been a party to the action to foreclose the mortgage, what would have been the effect upon her rights had she been made a party to that action? If she had been a party and it had transpired that this mortgagee had notice of her prior unrecorded deed at the time the mortgage was executed and delivered, could it be claimed that her rights would have been destroyed and her deed held for naught? We think not."

In *Lamont v. Cheshire*, 65 N. Y. 30, in considering the effect of a notice of *lis pendens* filed under a statute in sub-

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stance like ours, after reviewing at some length the theory of *lis pendens*, the court said:

"It has been seen, in the course of this discussion, that the theory of a *lis pendens* is that there must be no innovation in the proceedings so as to *prejudice* the rights of the plaintiff. It is simply a rule to give effect to the rights *ultimately* established by the decree. Applying this doctrine to the present case, it would be impossible to claim that a *lis pendens* could give a creditor under an attachment a lien superior to the title of a purchaser under an unrecorded conveyance. The statute distinctly provides that a person whose conveyance is executed or recorded subsequent to the filing of a notice shall be deemed a subsequent purchaser, and bound by the proceedings *to the same extent as if he were a party to the action*. It is necessary to ascertain, therefore, what would have been the effect if the defendants had been made parties to the action. Had the plaintiff made the defendants parties to the action, his attachment proceedings would, of course, have been nugatory. As soon as the whole case had been disclosed it would have appeared that he was making a claim against a person who was in no respect liable to him, and his complaint would have been dismissed. How can he, under the statute, have any greater claims by omitting him? The words 'to the same extent as if he were a party to the action' cannot be omitted in construction.

"The scope of the clause is quite apparent. The case of conveyances executed *after* the filing of the notice comes within the ordinary rules of equity. What is now in the one hundred and thirty-second section of the Code is the provision in respect to a conveyance executed *prior to* and *recorded subsequent to* the filing of the notice. . . . On the other hand, if there should be a purchaser in good faith, he would, in all probability, acquire a perfect title, and the holder of the prior unrecorded mortgage would be remitted to an equitable claim upon the purchase money as against any person holding a position subordinate to his own. Each case would thus be governed by its own peculiar circumstances. There is but a single underlying principle. This is, that the holder of the unrecorded instrument is affected to the same extent 'as if he were a party to the action,' and had not appeared or made any defense."

The following also lend support to the view that our statute is one of procedure only, for the purpose of making effective whatever decree may be rendered in favor of the plaintiff in an action of this nature, regardless of conveyances made or recorded subsequent to the filing of the notice of *lis pendens*, and that it is not a law controlling the substantive rights of the parties which may be adjudicated upon the merits in the action. *Payson v. Jacobs*, 38 Wash. 203, 80 Pac. 429; *Wright v. Jessup*, 44 Wash. 618, 87 Pac. 930; *Baker v. Bartlett*, 18 Mont. 446, 45 Pac. 1084, 56 Am. St. 594.

Aside from the claimed effect of the *lis pendens* notice, counsel make some contention that respondents were not purchasers of the property for value, because of the fact that the consideration given by them therefor was the cancellation of a preexisting debt due to them from Fred O. Pattison and wife, and the assumption of mortgages and taxes upon the property. We are to remember that there was an absolute conveyance of the property, intended as such, in full satisfaction of the debt, as well as the assumption of the mortgages and taxes on the part of respondents. If the entire consideration had been a preexisting debt, we might then be under the necessity of reviewing the seeming conflicting authorities upon the question of whether or not respondents would be *bona fide* purchasers for value. 39 Cyc. 1699, and cases cited. See note in *Title Guaranty & Surety Co. v. Klein* (178 Fed. 689), 27 L. R. A. (N. S.) 620. Since practically one-half of the consideration was the assumption of mortgage debts against the property, which was a new consideration, respondents were in any event thereby rendered purchasers for value. Our attention has not been called to any authorities holding to the contrary. *Alder-Goldman Commission Co. v. Clemons*, 64 Ark. 197, 41 S. W. 417; *Drey v. Doyle*, 99 Mo. 459, 12 S. W. 287; *Warren v. Wilder*, 114 N. Y. 209, 21 N. E. 159; *Henderson v. Pilgrim*,

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22 Tex. 464. We conclude that respondents were purchasers in good faith and for full value.

Appellant's rights surely are in no event superior to those of a judgment creditor. The holder of a prior unrecorded mortgage has been held to have a lien upon the mortgaged property superior to that of a judgment creditor, upon the ground that the latter is not a purchaser for value as against such prior mortgagee. *Dawson v. McCarty*, 21 Wash. 314, 57 Pac. 816, 75 Am. St. 841. Our decisions in *Dow v. Ballard*, 28 Wash. 87, 68 Pac. 176, and *McDougall v. Murray*, 57 Wash. 76, 106 Pac. 490, 26 L. R. A. (N. S.) 159, are in harmony with this holding, though not presenting the exact question here involved.

We conclude that the learned trial court correctly determined the respective rights of the parties, and therefore affirm the judgment.

MORRIS, C. J., HOLCOMB, and MOUNT, JJ., concur.

[No. 12430. Department Two. April 22, 1915.]

MARY KANGLEY, *Respondent*, v. NANNIE ROGERS, *Executrix et al.*, *Appellants*.¹

ACKNOWLEDGMENT—FALSE CERTIFICATE—LIABILITY ON BOND. Where a notary public certifies that the wife of a mortgagor personally appeared before him, and acknowledged the execution of the mortgage, when in fact no one was present or assumed to make such an acknowledgment, the notary is liable on his official bond as for a false certification.

HUSBAND AND WIFE—COMMUNITY PROPERTY—LIABILITY. The performance of the duties of notary public by the husband, being a community business engaged in for the benefit of both spouses, the community is liable on a judgment for his negligence in failing to faithfully discharge his duties as notary public.

EVIDENCE — CHARACTER — CAREFULNESS IN DISCHARGING DUTIES. In an action against a notary public and his bondsman for a specific act of negligent discharge of duties in taking an acknowledgment, evidence that he was ordinarily careful in taking acknowledgments, was inadmissible.

Appeal from a judgment of the superior court for King county, French, J., entered May 1, 1914, upon findings in favor of the plaintiff, in an action in tort, tried to the court. Affirmed.

Herr, Bayley & Wilson, for appellants.

Wright, Kelleher & Caldwell, for respondent.

MORRIS, C. J.—Action to recover damages claimed to have been sustained because of the failure of a notary public to faithfully discharge the duties of his office and exercise due diligence in certifying that one Alice A. Gunby, known to him to be the wife of Joseph C. Gunby, personally appeared before him and acknowledged the execution of a real estate mortgage in which the respondent was named as mortgagee. Subsequent to the commencement of the action, the notary

¹Reported in 147 Pac. 898.

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died, and the action proceeded against his executrix and the surety on his official bond. That Alice A. Gunby did not execute, nor appear before the notary and acknowledge the execution of this mortgage, and that her signature is a forgery, is admitted.

Much is said in the briefs as to the degree of care to be exercised by a notary public in taking and certifying acknowledgments when he does not personally know the party appearing before him, and what, under such circumstances, would be such negligence as to subject the notary and his sureties to liability; but, after reading this record, we do not regard it as necessary to answer these questions, as we are satisfied that no one appeared before the notary assuming to be Alice A. Gunby. The lower court so expressed an opinion at the conclusion of the trial, but in the findings contented itself with a finding that the notary failed and neglected to faithfully discharge the duties of his office, and failed and neglected to exercise due diligence. It is admitted by all the authorities, and must necessarily be so, that certifying to a wife of any person, as present, who was not, is such negligence as to render the notary liable on his official bond as for a false certification. *State ex rel. Savings Trust Co. v. Hallen*, 165 Mo. App. 422, 146 S. W. 1171.

The next contention is that, under the rule announced in *Day v. Henry*, 81 Wash. 61, 142 Pac. 439, the judgment cannot be sustained as a community judgment. It was held in the cited case that a judgment rendered against a sheriff, who was at the time a married man, for a wrongful levy made by him as sheriff, was not a judgment that could be enforced out of community property. We attempted in that case to distinguish as between the wrongful act of a member of a community and the wrongful act of a community, finding the line of demarcation in the doing of the act, saying:

"If the community as such does a wrong, it must respond, just as under the same circumstances a corporation, a partnership, or any other legal entity composed of more than

one person, must respond. If, on the other hand, an individual member of any of these legal entities commits a wrong, there is no liability attached to the entity simply because of his relation to it. The liability, if at all, must be based upon the act, and flows against the one who does the act, and that one only. . . ."

We are satisfied with the reasoning of that case. It is, we think, apparent that such reasoning has no application here. A community may engage in the business or calling of a notary public just as it may engage in the practice of law or any other business or profession conducted by the husband alone, and when so engaged, it is not a parallel case to a married man elected to fill the office of sheriff, where the duties and responsibilities are fixed by law and can be fulfilled only by those elected to fill them. A community may engage in the business of a notary public if it chooses, and can obtain authority for one of its members to so act, just as it may engage in the practice of law or medicine, providing it obtains authority for one of its members to so act; but a community cannot be elected to an office and discharge the duties of that office.

Error is also predicated upon the rejection of testimony to the effect that the notary was ordinarily careful in taking acknowledgments. This was not error. The act complained of was a specified act in which no question of probability entered, as in cases where evidence of the character of that rejected is admissible. The overwhelming weight of authority excludes evidence of character offered for the purpose of raising an inference of conduct in actions charging negligent acts. *Carter v. Seattle*, 19 Wash. 597, 59 Pac. 500; 4 Chamberlayne, *Modern Law of Evidence*, § 3283. There was no error in the denial of a new trial.

The judgment is affirmed.

FULLERTON, CROW, ELLIS, and MAIN, JJ., concur.

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Opinion Per Crow, J.

[No. 12448. Department Two. April 22, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v.GEORGE WILLIAMS, *Appellant*.¹

RAPE—RESISTANCE—SUFFICIENCY OF EVIDENCE. In a prosecution for assault with intent to rape, a verdict against defendant is sustained by evidence showing that the prosecuting witness fought defendant as much as she was able; that she was afflicted with heart trouble, which prevented further resistance; and that, within an hour after the assault, she complained to two persons, one of them a policeman.

RAPE—RELATION OF PERSON ASSAULTED—SUFFICIENCY OF EVIDENCE. A finding by the jury that the prosecutrix in a prosecution for assault with intent to rape was not the wife of defendant was warranted, where the evidence showed that defendant had met her only a few times within a period of a few days preceding the assault, and that he did not know her name; and defendant testified he was a married man, and that his wife was in the courtroom during the trial, it being manifest that the person to whom he referred was not the prosecuting witness.

Appeal from a judgment of the superior court for King county, Humphries, J., entered June 20, 1914, upon a trial and conviction of assault in the second degree. Affirmed.

Howard O. Durk, for appellant.

John F. Murphy and *Crawford E. White*, for respondent.

Crow, J.—The defendant, George Williams, has appealed from a judgment and sentence entered upon the verdict of a jury convicting him of the crime of assault in the second degree. The information charges that:

“He, said George Williams, in the county of King, state of Washington, on the 21st day of March, 1914, did then and there wilfully, unlawfully and feloniously make an assault upon the person of one Olive Jacobsen, a female person, with intent then and there to commit a felony, to wit, rape, upon said Olive Jacobsen.”

¹Reported in 147 Pac. 865.

The only question raised by the assignments of error is that the evidence was not sufficient to sustain the verdict. The above excerpt, quoted from the information, clearly sets forth the charge. In a case of this character no good purpose would be served in stating the evidence in detail. Appellant's principal contention is that it is not sufficient to show that the prosecuting witness resisted his assault with such force as to show a want of consent upon her part. She testified that she fought him as much as she was able; that she is afflicted with heart trouble, which prevented further resistance on her part. The evidence further shows that, within an hour after the assault, she complained to two witnesses, one of whom was a policeman, and that appellant was arrested within a day or two and charged with the crime.

Another point raised is that the evidence fails to show that the prosecuting witness was not appellant's wife. The undisputed evidence shows that he had met her only a few times within a period of a few days preceding the assault, that he did not know her name, and that he and she were scarcely acquainted. He himself testified that he was a married man; that his wife was in the courtroom at the time of the trial, it being manifest that the person to whom he referred as his wife was not the prosecuting witness. The prosecuting witness was not his wife, and the jury was justified in so finding.

No assignments of error are made upon the admission or rejection of evidence, nor upon the instructions given or refused. The evidence is clearly sufficient to sustain the verdict and the judgment is affirmed.

MORRIS, C. J., ELLIS, MAIN, and FULLERTON, JJ., concur.

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Opinion Per ELLIS, J.

[No. 12456. Department Two. April 22, 1915.]

E. J. STRELAU *et al.*, *Appellants*, v. THE CITY OF SEATTLE
et al., *Respondents*.¹

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—APPEAL—EQUITABLE RELIEF. Under the eminent domain act of 1907 (Rem. & Bal. Code, § 7768 *et seq.*), governing condemnation proceedings by cities, which provides that the assessment roll shall be heard before the superior court as a court of first instance, and under Rem. & Bal. Code, § 7797, which provides that “the judgment of the court shall have the effect of a separate judgment as to each tract or parcel of land or other property assessed, and any appeal from such judgment shall not invalidate or delay the judgment except as to the property concerning which the appeal is taken,” such judgments are final and can be corrected only on appeal or by statutory proceedings on motion or petition within one year of their entry; hence property owners, who failed to appeal or to institute proceedings within one year to vacate or modify the judgment, cannot subsequently by action in equity obtain the same relief accorded to property owners who had appealed and thereby secured a reduction of their assessments.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered October 6, 1914, upon sustaining a demurrer to the complaint, dismissing an action for equitable relief, tried to the court. Affirmed.

Hastings & Stedman, for appellants.

James E. Bradford and *Howard A. Hanson*, for respondents.

ELLIS, J.—This is the third appeal involving the special assessment roll made by the eminent domain commissioners and confirmed by the superior court on January 15, 1913, to pay for the West Wheeler street improvement, in the city of Seattle.

The action is one in equity, commenced on June 10, 1914, by property owners who did not appeal from the original

¹Reported in 147 Pac. 1144.

judgment confirming the assessment roll, and who did not, by petition, motion or otherwise, institute any proceedings in the trial court within one year from its entry to vacate or modify that judgment. In this action they seek the same relief which was accorded on the first appeal to the property owners who participated in that appeal, and which it may be assumed would have been accorded to the plaintiffs here had they appealed from the original judgment. The trial court sustained a demurrer to the complaint and dismissed the action. Hence this appeal.

The first appeal was prosecuted by certain of the property owners whose property was assessed, from the judgment of the superior court confirming the roll. We refer to the opinion in that case for a full statement of the physical conditions of the district. On that appeal the roll was remanded for revision because the cost of the "lowland" roadway, to the extent of about \$30,000, was erroneously assessed to the "highlands." *In re West Wheeler Street*, 77 Wash. 3, 137 Pac. 303.

The second appeal was by the city from an order of the superior court rereferring the entire roll to the eminent domain commission to recast it throughout, in effect, giving to those highland property owners who had not appealed from the original judgment of confirmation, or who had waived their appeal by voluntarily paying their assessments, the full benefit of the first appeal in which they had not participated, and relief from a judgment in which they had acquiesced by their failure to appeal and by payment. On the second appeal, we said that the opinion in the first appeal must "be construed according to its necessary legal effect as applied to the parties and things before the court, and to parties in privity, rather than according to its literal terms." We there pointed out that the statute, Rem. & Bal. Code, § 7797 (P. C. 171 § 89), in express terms makes the original judgment of confirmation a "separate judgment as to each tract or parcel of land," and declares that "any appeal from such

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judgment shall not invalidate or delay the judgment except as to the property concerning which the appeal is taken." We held that the decision on the first appeal "could not and did not 'invalidate or delay' the original judgment as to property concerning which no appeal was taken." The cause was therefore remanded with direction to enter an order reducing the assessments against the property of the appellants only, and reassess the lowlands to make up the resulting deficiency. *In re West Wheeler Street*, ante p. 146, 147 Pac. 873.

This court held the same way in the earlier cases, *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279, and *Seattle v. Sylvester-Cowen Inv. Co.*, 55 Wash. 659, 104 Pac. 1121. In the former case, after quoting the statute, Rem. & Bal. Code, § 7797 (P. C. 171 § 89), this court said:

"From this provision it appears that the action of this court can affect only the property of appellants; and that those property owners who did not appeal cannot share in the fruits of success with those who bore the burden of the appeal against the illegal assessment."

While in the *Sylvester-Cowen* case this court held that, on the application to the superior court to revise and correct the roll made by the eminent domain commissioners, *that court* acquires jurisdiction of the entire matter until final judgment and may, when it deems that course equitable, grant relief to noncontesting property owners, that case also unequivocally reaffirms the rule announced in the *Westlake* case confirming that power to the trial court and denying it to *this court*, as appears in the following language:

"*In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279, cited in support of the appellant's contention, states that the action of this court only affects the property of the parties who appeal. Obviously so, as the final judgment of the lower court is conclusive upon all who are content to accept it."

The decision in the case of *Van Der Creek v. Spokane*, 78 Wash. 94, 138 Pac. 560, relied upon by the appellants, does

not abrogate, change or modify that rule. When confined to its own facts and the statute governing them, it has no bearing on this case. It involved an assessment for street grading, and construed the statute of 1911 (§ Rem. & Bal. Code, § 7892-1 *et seq.*) relating to such assessments and governing appeals from the city council to the superior court. It did not attempt to construe the statute limiting the effect of appeals to the supreme court in eminent domain assessments, a wholly different statute (§ Rem. & Bal. Code, §§ 7797, 7798; P. C. 171 §§ 89, 91). In eminent domain proceedings, the superior court does not act as an appellate court, but as a court of first instance, after notice to all the property owners in the district, to revise the assessment roll made by the eminent domain commissioners. (§ Rem. & Bal. Code, §§ 7791, 7792 *et seq.*; P. C. 171 §§ 77, 79). In the *Van Der Creek* case, the first assessment roll (obviously not an eminent domain roll) was heard before the city council, and certain property owners objected, but the council confirmed the roll. Upon appeal to the superior court, that roll was set aside. A new roll was prepared under the reassessment statute. To this new roll, objections were made by those formerly objecting, and others who had made no objection to the original roll. The council confirmed the reassessment roll. On appeal, the superior court set aside the reassessment roll. The city then appealed to this court on the ground that parties not objecting to the first roll were allowed to object to the reassessment roll. We held that the superior court properly set aside the first roll as absolutely void, because the council in making the assessment had exceeded its jurisdiction in that the entire assessment greatly exceeded fifty per cent of the assessed valuation for general taxes of all the property in the district, in direct contravention of the law of 1911 (§ Rem. & Bal. Code, § 7892-12). We therefore held that the reassessment was a proceeding *de novo*, "undertaken as if no assessment had even been made," and said:

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"The law does not undertake to define or limit the rights of protesting parties on reassessment, but does say in terms that the reassessment shall be made in accordance with the provisions of law and ordinance existing at the time the reassessment is made."

The sum of our decision in that case was that, when the superior court had properly vacated and set aside the original roll and a reassessment was made, original nonobjectors were entitled to object on any and all grounds—a very different thing from what we are now asked to hold.

In this case, the judgments rendered in the superior court were, in effect, separate judgments against each of the properties involved. They were entered by a court of competent jurisdiction, proceeding within its jurisdiction on notice to the owners of each of the properties, including these appellants. The trial court found that their properties were subject to assessment, were specially benefited in the amounts assessed against them, and upon a hearing pursuant to such notice, confirmed the assessments. These are final judgments, and as such do not differ from other final judgments. Like other final judgments, they can only be corrected on appeal, or by statutory proceedings on motion or petition within one year from their entry. *Seattle v. Krutz*, 78 Wash. 553, 139 Pac. 498. Failing all of these, a bill in equity cannot be invoked as a belated substitute. The demurrer was properly sustained.

Judgment affirmed.

MORRIS, C. J., MAIN, FULLERTON, and CROW, JJ., concur.

[Nos. 12730, 12732, 12737. *En Banc*. April 22, 1915.]

THE STATE OF WASHINGTON, *on the Relation of F. G. Blakeslee, Plaintiff*, v. C. W. CLAUSEN,
State Auditor, Respondent.

THE STATE OF WASHINGTON, *on the Relation of Schwabacher Brothers & Company, Incorporated, Plaintiff*, v.
C. W. CLAUSEN, *State Auditor, Respondent.*

THE STATE OF WASHINGTON, *on the Relation of James Martin, Plaintiff*, v. C. W. CLAUSEN, *State Auditor, Respondent.*¹

CONSTITUTIONAL LAW—CONSTRUCTION OF CONSTITUTIONAL PROVISIONS. In ascertaining the intent in adopting an amendment to the constitution providing for the referendum on new laws, courts may resort to the history of such legislation, the contemporaneous construction, the changes made, the context and subject-matter, and the purpose and spirit of the act and the form in which the idea has been fashioned in other states.

STATUTES—ENACTMENT—REFERENDUM—"SUPPORT." The seventh amendment of the state constitution (Const., art. 2, § 1, subd. b) giving the right of referendum upon all laws except such as may be necessary for the "immediate preservation of the public peace, health and safety, [and the] support of the state government and its existing public institutions," contemplates "support" as including appropriations for current expenses, maintenance, upkeep, continuation of existing functions, as well as appropriations for such new buildings and conveniences as may be necessary to meet the needs and requirements of the state in relation to its existing institutions.

SAME—REFERENDUM—APPROPRIATIONS. Under such referendum clause of the constitution, a law providing for a state institution and carrying an appropriation is subject to referendum, where it brings the state into a new activity or provides for a new function, so that it might be fairly said that it did not pertain to the support of the government as then organized, or to any existing institution.

SAME—REFERENCE OF PART OF ACT—EFFECT ON "SUPPORT" PROVISIONS. All ordinary appropriation bills are excepted from the operation of such referendum clause of the constitution; but the pres-

¹Reported in 148 Pac. 28.

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ence of an appropriation measure as part of a bill would not necessarily deprive the people of the right to pass upon other portions of the bill; nor would an appropriation for the support of an existing institution fall while some particular item in a general law of which it is a part is subject to referendum.

SAME—"PUBLIC INSTITUTIONS." The highway department, the fisheries department, and the state fair are "public institutions" of the state, within the meaning of the referendum amendment to the constitution excepting laws for their support from the operation of the amendment; since "public institutions" includes all departments exercising any state activity or function.

STATUTES—ENACTMENT—REFERENDUM—"IMMEDIATE." In the clause of the referendum section of the constitution excepting from its operation laws for "the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions," the qualifying adjective "immediate" refers solely to the subsequents of the series, and not to the term "support"; hence appropriation measures for the support of state government and institutions are reserved from referendum, although not of an emergent character.

STATUTES—ENACTMENT—TIME OF TAKING EFFECT. The legislature, in the absence of constitutional restraint, can fix any time in the future as the time when laws shall become effective.

FULLERTON, J., dissents.

Application filed in the supreme court April 1, 1915, for a writ of mandamus to compel the state auditor to issue warrants for material and supplies furnished certain state departments. Granted.

Troy & Sturdevant, for relator Blakeslee.

Kerr & McCord, for relator Schwabacher Brothers & Co.

Fletcher & Evans, for relator Martin.

The Attorney General, for respondent.

CHADWICK, J.—These cases depend upon the answer to the question whether items in appropriation bills, in so far as they affect the claims of the relators, are subject to the referendum under the seventh amendment to the constitution of this state.

The claim of the relator Blakeslee is for materials furnished to the highway department of the state of Washington. The claim of the relator Schwabacher Brothers & Company is for food for young salmon hatched at the state fish hatcheries and bought by the fisheries department of the state of Washington. The claim of the relator Martin is for supplies furnished to the agricultural department of the state of Washington. Inasmuch as all of these cases rest upon, and must be determined by reference to, the same principle, we will accept, as the subject of our discussion, the claim of relator Blakeslee.

At the 1913 session of the legislature, a general scheme of highway development was adopted. Laws 1913, p. 221 (3 Rem. & Bal. Code, § 5878-1). Appropriations were made and much work done under the supervision of the highway department of the state. Appropriations were made by the legislature just adjourned to continue the general scheme, to maintain existing highways, to finish those under construction, and to survey and construct new highways. Those sections of the appropriation bill which are pertinent to our present discussion are as follows:

"Section 1. For the survey, construction and maintenance of primary and secondary highways of the state, there is hereby appropriated out of the public highway fund the sum of one million nine hundred thirty-seven thousand, nine hundred eight-five dollars (\$1,937,985.00) apportioned in the manner hereinafter provided: . . .

"The Olympic Highway, for survey and construction, between Shelton and Quilcene. . . . \$96,250.00."
Laws 1915, p. 182.

The relator sold certain supplies and materials to the highway department to be used in the survey and construction of that part of the Olympic highway between Shelton and Quilcene. The state auditor refused to audit his bill and draw a warrant, upon the ground that the emergency clause attached to the bill is not operative to carry the appropria-

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tion over the right of referendum reserved by the people in the seventh amendment to the constitution of the state. Const., art. 2, § 1, subd. b.

The emergency clause, with the exception of two words which in no way affect its sense, is in the language of the constitution, § 2.

"Sec. 2. This act is necessary for the immediate preservation of the public peace, health and safety, [and the] support of the state government, and its existing public institutions, and shall take effect April 1, 1915." Laws 1915, p. 185.

Thereupon relator brought this proceeding in mandamus to compel the issuance of a warrant in payment of his bill, insisting that the appropriation is presently available. While an argument is made upon the theory that the appropriation is necessary for the immediate preservation of the peace, health and safety, we are not disposed to follow it. Our judgment may be put upon surer ground. The real controversy revolves around the words "support" and "public institutions."

The relator contends that "support" means any appropriation designed to promote or effectuate any of the admitted functions of the state, and that a "public institution" is any branch or department of the state government to which any of its functions may have been delegated by the legislature; that the highway department and an established road are at once existing institutions within the meaning of the constitution.

The Attorney General contends that the word "support" must be taken in a literal and restricted sense, and means "the continuing regular expenditures of the various state offices and departments for the maintenance of such offices and departments. Under this interpretation, the term would include salaries, fuel, current repairs, supplies, printing and other current expenses of like character." In other words, he contends that the words "support of the state government

and its existing institutions" means no more than "current expenses." To sustain this construction, he relies mainly upon the case of *McClure v. Nye*, 22 Cal. App. 248, 133 Pac. 1145. It may be said if the *McClure* case is not an apt authority there is no authority to sustain the attitude of the respondent. It would probably be enough to say that the exception reserved by the people of the state of California is enough to distinguish that case; the exception being appropriations for "current expenses," whereas we have no such limitation. However, inasmuch as counsel for the respondent is apparently serious in his contentions, we shall endeavor to show wherein the *McClure* case has no bearing on the cases at bar.

The word "support" may have either meaning. Our duty is to find the legislative intent in passing the amendment, and the like intent of the people in adopting it. While we think the language of the constitution is plain and unambiguous and calls for no construction, if there be any doubt, there is no better rule—indeed there is no other rule to which we can refer—than the purpose of the amendment as it may be gathered from the history of such legislation, with its contemporaneous construction and discussion.

In all matters involving an inquiry into political questions, especially so where they relate to a change in accepted forms and fundamental theories, courts must take notice of such changes, the sentiments which sustain them, the reasons urged for or against them, the old condition and the purpose of the change. If it were not so, there could be no rule of construction. There can be no resort to precedent, except in the way of analogy; for the question is one of first inquiry, and precedent is no more than a former decision or accepted practice applying a settled principle to a new or existing condition.

Let us then briefly consider the new order popularly known as direct legislation. The idea did not come from South Dakota or Oregon. It is as old as government. It

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was considered by the framers of the Federal constitution. They found that the right of the people to compel responsive legislation would be sufficiently secured by frequent elections. In later years, the idea was revived. Following an agitation sustained by a persistent propaganda, the plan was framed in words and adopted as a part of the fundamental law in several states of the Union.

The state of Washington, though not the first to adopt an amendment to its constitution, did not borrow the idea from any of the states which had adopted it. The agitation in its favor did not ripen quite so soon in this state; but, at the time other states adopted it, the idea of direct legislation was a live question, which, like most questions of great public interest, became so persistent that it could be settled only by adoption or rejection.

It must be kept in mind that the theory of direct legislation and the referendum is a thing neither new nor original. On the other hand, the purpose, the limitations on the legislature and reservations of the people attending its exercise, are to be gathered from the words, context, subject-matter, reason and spirit of the enactment, just as any other law or declaration of fundamental right is to be ascertained. In ascertaining the purpose and its limitations and reservations, we may well look to the form in which the idea has been fashioned in other states, and their experiences, assuming that the legislature and the people had these in mind and, if evil, that they intended to avoid them; if good, that they intended to adopt them.

"Moreover, it must not be overlooked that this legislation is experimental. Even in construing the terms of a statute, courts must take notice of the history of legislation, and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions and, therefore, most likely to have been the construction intended by the law-making power." *Texas & Pac. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197.

"Courts in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge v. Williams*, 3 How. 24; *Preston v. Browder*, 1 Wheat. 120." *United States v. Union Pac. R. Co.*, 91 U. S. 72.

"And it may recur to the general state of opinion—public, judicial, and legislative—at the time of the enactment. End. Interp. St. § 29." *United States v. Oregon & C. R. Co.*, 57 Fed. 426.

"If the words of the law seem to be of doubtful import, it may then perhaps become necessary to look beyond them in order to ascertain what was the legislative mind at the time the law was enacted; what the circumstances were under which the action was taken; what evil, if any, was meant to be redressed; what was the leading object of the law, and what the subordinate and relatively unimportant objects." *Maryland Agricultural College v. Atkinson*, 102 Md. 557, 62 Atl. 1035.

"Statutes are but public sentiments enacted into laws, and frequently the policy of such legislation is the subject of much public discussion, both before and at the time of its enactment. In construing it courts may not shut their eyes to these public discussions. They are proper matters of consideration in determining the legislative intent, and should be considered for that purpose in the construction of an act growing out of such discussion." *State ex rel. Coleman v. Kelly*, 71 Kan. 811, 81 Pac. 450, 70 L. R. A. (N. S.) 450.

"Constitutions are to be construed as the people construed them in their adoption, if possible; and the public history of the times should be consulted, and should have weight in arriving at that construction." *Bay City v. State Treasurer*, 23 Mich. 499.

"To ascertain the intention of a statute, it should be read in view of all the surrounding facts and circumstances under which it was enacted and, it may be added, 'common sense and good faith are the leading and principal characteristics of all interpretation.' (*Bank v. Haywood*, 62 Mo. App. 550; Potter's *Dwarris on Statutes and Constitutions*, p. 48, *Sedalia v. Smith*, 104 S. W. 21, 206 Mo. 346)." *Lexington*

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ex rel. Menefee v. Commercial Bank, 130 Mo. App. 687, 108 S. W. 1095.

Several years before the legislature submitted the amendment to our constitution, the people of Oregon had adopted the initiative and referendum with practically no limitations. Their constitution reads, "except as to laws necessary for the immediate preservation of the public peace, health, or safety."

It was a matter of common knowledge that, under this unbridled license to refer legislation, the state university had been denied the benefit of an appropriation for its support and maintenance; that one of the state institutions exercising an essential function of the state had been crippled and embarrassed and but for the pledge of private credit would have been destroyed, for a time, at least. This and like facts were urged by those opposed to the initiative and referendum.

Our state schools, from the primary grades of the public school to the highest degrees bestowed by our colleges, are the brightest jewel in the crown of American accomplishment. In no state has there been a greater loyalty to the idea that an educated citizen is a safe citizen than in the state of Washington. Our common school system is rated first in general efficiency of all the states in the Union by the Russell Sage Foundation. We may well assume that the people of this state had no intention of falling into the error that Oregon had made, and so framed their constitution that our government and its institutions should not be put to the embarrassments that might follow an agitation which could be supported and a vote compelled by a number of the electors so small that it may be said to be merely nominal—six per cent of the vote cast at a previous election. It would seem that they could not have adopted plainer or simpler language than they did: "support of the state government and its existing institutions."

A year before the people of this state acted, the people of California had adopted a constitution in which they had reserved the right to act upon all appropriations except those passed for the "current expenses of the state."

It must have been manifest, if this reservation were adopted, that the growth and development of our state institutions, as well as the support of the government, might be seriously impaired by reckless and irresponsible agitation sustained by a number so few that it could not, by any generosity of opinion, be said to represent general sentiment or public opinion and that our people purposely avoided the probability of such evil consequences.

The fault of the *Attorney General's* argument lies in this: He assumes a condition that cannot exist if we give the words of our constitution their ordinary meaning, and rests his argument upon authorities construing forms and phrases which the people of this state not only had no intention of adopting but purposely rejected. The cases from other states are, therefore, valueless either as precedent or authority. They are right when applied to their own constitutions, but none of them assume to discuss the meaning of our own.

As illustrative of the care taken by the people of the several states to express their real intention, we will assume the risk of being indicted for prolixity and copy the exceptions found in several of the later constitutions and amendments.

The exception in the Oregon and Arkansas constitutions is, "except as to laws necessary for the immediate preservation of the public peace, health, or safety." Const. Ore., art. 4, § 1; Const. Ark., amend. 10, § 1.

Oklahoma excepts enactments for carrying into effect provisions relating to the initiative and referendum or a general appropriation bill:

"An emergency measure shall include only such measures as are immediately necessary for the preservation of the public peace, health, or safety, and shall not include the granting of franchises or licenses to a corporation or individual, to

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extend longer than one year, nor provision for the purchase or sale of real estate, nor the renting or encumbrance of real property for a longer term than one year." Const., art. 5, § 58.

California excepts, "acts calling elections, acts providing for tax levies or appropriations for the usual current expenses of the state and urgency measures necessary for the immediate preservation of the public peace, health or safety, passed by a two-thirds vote of all the members elected to each house. Whenever it is deemed necessary for the immediate preservation of the public peace, health or safety that a law shall go into immediate effect," etc. Const., art. 4, § 1.

Ohio reserves the referendum of, "Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect." Const., amend. art. 2, § 1d.

Colorado excepts laws, "necessary for the immediate preservation of the public peace, health or safety, and appropriations for the support and maintenance of the department of state and state institutions." Const., art. 5, § 1.

Michigan provides: "except that the legislature may give immediate effect to acts making appropriations and acts immediately necessary for the preservation of the public peace, health or safety by a two-thirds vote of the members elected to each house." Const., art. 5, § 21.

South Dakota excepts, "such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions." Const., art. 3, § 1.

Our constitution is, in meaning, the same as the constitution of Michigan, but not quite so specific as is the constitution of Colorado. The question whether appropriation bills or bills for the support of the government and its existing institutions should be subject to the referendum being at

all times a live topic of controversy pending the adoption of these amendments, we must credit the people with knowing their own purposes and with knowing how to express them. If they had intended that general appropriations or appropriations other than those for current expenses should be subject to the referendum, it would seem that they would have done here as they did in Ohio, reserve the authority to pass upon any item of an appropriation bill; or as they did in California, limit the reservation to all appropriations other than those for current expenses. Our constitutional provision means just what we said in the case of *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11:

"The true rule is: The referendum cannot be withheld by the legislature in any case except it be where the act touches the immediate preservation of the public peace, health, or safety, or the act is for the financial support of the government and the public institutions of the state, that is, appropriation bills."

The intent and purpose of the people, as gathered from the words of the constitution and the circumstances attending the adoption of the seventh amendment, impels the holding that the people intended to use the word "support" in its fullest sense. When so considered, "support" includes appropriations for current expenses, maintenance, upkeep, continuation of existing functions, as well as appropriations for such new buildings and conveniences as may be necessary to meet the needs and requirements of the state in relation to its existing institutions.

In Webster's New International Dictionary, the word "support" is given the following definitions: "To furnish with funds or means for maintenance; to maintain; to provide for. To enable to continue; to carry on."

In the absence of an express reservation, it would be a usurpation on the part of any court to say that an appropriation directed to the maintenance of the existing activities of the state is subject to the referendum. The first right of

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government is the right of self-preservation, and to say that the people intended, in the absence of an express reservation, to allow the government or its institutions to be crippled or embarrassed in any way would be to say that the people intended that the government could not sustain itself through the mediumship of the ordinary and recognized methods of legislation.

The case of *Sheldon v. Purdy*, 17 Wash. 135, 49 Pac. 228, is relied on. It has no application to the cases at bar. It was there held, under existing statutes and § 5, art. 7 of the constitution, that, inasmuch as the legislature had provided a certain method for building new buildings in a school district, money raised to carry on and meet the current expenses of the common schools could not be diverted to the building of new buildings. It is true that the court said:

“The terms ‘support’ and ‘current expenses,’ when applied to the common schools of this state, mean continuing regular expenditures for the maintenance of the schools.”

The court was not dealing with those words in the abstract, but was defining them in the light of existing and controlling statutes and the constitution.

It does not follow that a referendum may not be had of a law, or any part of a law, carrying an appropriation. If a law were passed bringing the state into a new activity, or providing for a new function so that it might be fairly said that it did not pertain to the support of the government as then organized or to any *existing* institution, as for instance, a law like the one creating the industrial insurance commission, the law creating a railroad commission, or a law establishing an entirely new institution, the rejection of the law would cause a lapsation of the appropriation.

The *Attorney General* says:

“The necessities of this case should not be permitted to blind the court to the real question, and that is, have the people the right to refer the fisheries code, or any part thereof? Have the people the right to refer the question of

the character of the appliances for the taking of fish permitted by that law, or have they the right to refer the revenue features of the law? The fact that the revenues are to be paid into a fisheries fund is immaterial. Suppose the legislature had provided for the payment of these revenues into the general fund. In that event, the present case would not be presented. But how would the court answer the question of the right of the people to invoke the referendum on this measure?"

The court is not called upon to answer the question. It is answered in the constitution. If the people desire a referendum upon any part of the bill referred to as the fisheries code, they have reserved that right in subdivision "b" of section 1, article 2, of the amendment. They say that a referendum may be ordered on any act, bill, law, or any part thereof passed by the legislature. If the people desire to pass upon the character of appliances for taking fish or any other feature of the law, they may do so, but it does not follow that an appropriation made by the legislature, either directly or indirectly, for the support of an existing institution must fail while some particular item in a general code is subject to the referendum. "We must not make a scarecrow of the law." The people very wisely forestalled the possibility of the situations suggested by counsel when they reserved the right to refer a part of a bill. Their evident purpose was to prevent the stoppage of the state's established functions pending a vote upon some question of policy.

It was clearly the intention of the people to except all ordinary appropriation bills. An appropriation bill is not a law in its ordinary sense. It is not a rule of action. It has no moral or divine sanction. It defines no rights and punishes no wrongs. It is purely *lex scripta*. It is a means only to the enforcement of law, the maintenance of good order, and the life of the state government. Such bills pertain only to the administrative functions of government. In excepting them and measures referable to the police power, it is manifest that the legislature and the people intended to re-

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serve to themselves the right to pass upon only such laws as define substantive rights, or which affect public measures and policies. It follows that the highway department, the fisheries department, and the state fair, are "public institutions" of the state.

We understand the *Attorney General's* argument to be that an existing public institution is some activity of the state which has taken form and is lodged in buildings or structures. The words "public institutions" can be given no such restricted meaning. A public institution is any organized activity created or established by law or public authority. Corporations are held to be public or political institutions. *Toledo Bank v. Bond*, 1 Ohio St. 622; *Mannington v. Hocking Valley R. Co.*, 183 Fed. 188.

The word "institution" is defined in Webster's New International Dictionary as "anything forming a characteristic and persistent feature in our national life or habits." "Established or organized society or corporations; an establishment, especially one of public character or one affecting a community."

"That the word 'institution,' both in legal and colloquial use, admits of application to physical things, cannot be questioned. One of its meanings, as defined in Webster's Unabridged Dictionary, is 'an establishment, especially of a public character, affecting a community.' And one of the meanings of 'establishment' as defined by the same authority, is 'the place in which one is permanently fixed for residence or business; residence with grounds, furniture, equipage, etc., with which one is fitted out; also, any office or place of business, with its fixtures.' The term 'institution' is sometimes used as descriptive of an establishment, or place, where the business or operations of a society or association is carried on; at other times it is used to designate the organized body." *Trustees of the Academy of Richmond County v. Bohler*, 80 Ga. 159, 7 S. E. 638.

If our argument be sound, it follows that a public institution of the state, within the meaning of the seventh amendment, is not alone those institutions of a physical character,

but, also, all branches and departments created by law and exercising any activity or function defined by the legislature and existing at the time the amendment was adopted, or which, if newly created by the legislature, have not been rejected by resort to the referendum.

Upon any theory, a public highway is a public institution. A road is not only a physical institution built by the state in the exercise of its sovereign duty to promote the convenience and necessities of the citizen as well as the common welfare, but the department to which the legislature has delegated that function is an institution as much so as is its creator, the legislature.

Some contention has been made that the word "immediate" qualifies the words "support of the state government and its existing institutions." The word immediate qualifies the words "public peace, health or safety" and no more. Where an adjective qualifies a series of words having relation, the one to the other, the last one being preceded by a connective, the qualifying word does not carry beyond the series.

In *State v. Bailey*, 67 Wash. 336, 121 Pac. 821, we had a similar question of construction. There the qualifying words were at the end of the sentence. We referred to the rule, as laid down in 2 Lewis' Sutherland, Statutory Construction (2d ed.), § 420:

"Relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent;"

and held that the words "which produces intoxication" did not qualify any words back of the connective "or." If the rule be good it is likewise the rule that the qualifying adjective "immediate" refers solely to the subsequents in the series.

"Peace, health and safety," are to be construed as coordinate words when determining either a power of government or a reservation of power. They refer to perils which may beset the state or its citizens, whereas the support of the gov-

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ernment and its institutions, from the nature of things, implies deliberation and the application of business principles, which may be as profitably exercised in public affairs as in matters of private concern. Moreover, it is a matter of common knowledge that the fiscal year of the state does not begin until the legislature adjourns. If we qualified the word "support" with the word "immediate," only appropriations of an extraordinary character would escape the referendum. As said in the Missouri Appeals case and by Mr. Sutherland, § 402, *supra*, common sense is a safe guide in construing statutes. If our conclusion be not the proper one, the constitutional provision would, in the light of its words and existing conditions, be ridiculous.

In answer to the suggestion that the legislature having fixed the time when the bill shall go into effect as April 1st is a circumstance indicating that the bill is not an emergent measure, it is enough to say that, having held that the bills here questioned, in so far as appropriation items are concerned, fall within the exception to the seventh amendment, the question does not occur. The legislature, in the absence of constitutional restraint, can fix any time in the future as the time when laws shall become effective.

No reason that appeals to us has been offered in support of the position of the respondent, nor does any reason suggest itself to our imagination.

The writ will issue.

PARKER, MAIN, and ELLIS, JJ., concur.

MORRIS, C. J., MOUNT, and CROW, JJ. (concurring)—We concur in the result for the reason that the question is a legislative and not a judicial question.

HOLCOMB, J. (concurring)—I concur in the foregoing opinion and would do so even if I had dissented in the *Brislawn* case. The decision in that case, until it shall have been reversed, is the law of this state. Believing that the parties interested in this action are entitled to the opinion of each

member of this court upon the question whether the act here involved falls within the exceptions to the reserved power of referendum contained in the seventh amendment to the constitution, with the decision in the *Brislawn* case as a factor, I desire to express my concurrence in this opinion on that as well as other grounds.

FULLERTON, J. (dissenting).—The opinion of the court in this case, and the opinions in the companion cases of *State ex rel. Case v. Howell*, *post* pp. 281, 294, 147 Pac. 1162, 1159, but emphasize, to my mind, the error into which the court fell in the case of *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11. If any general conclusions or rules may be gathered from these opinions, they are these: (1) The court has power to inquire whether an act declared emergent by the legislature is or is not emergent; (2) that, in making such inquiry, the court will not enter into an examination of extrinsic evidence, but will determine the fact of emergency from the face of the act, tested in the light of those matters of public concern of which it may take judicial knowledge; and (3) that, if it finds, on making such inquiry, that doubt exists as to the fact of emergency, it will uphold the law, otherwise the law will be declared invalid.

I cannot accept these conclusions as sound in principle. I may, with reference to the first, premise by saying that I do not deny the power of the court to inquire into the constitutionality of an act of the legislature as that power has heretofore been understood and exercised by the courts. While the power has been somewhat vehemently denied, especially within recent years, I am not of the number who have taken that view. The reasoning of Marshall, in the case of *Marbury v. Madison*, 1 Cranch 137, and the reasoning of Webster, in his reply to Hayne, not to mention more recent instances, demonstrate to my mind the existence of the power as conclusively as anything can be demonstrated which is incapable of yardstick measurement. What I mean to deny

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is that the question here presented is the question ordinarily presented when it is claimed there is a conflict between an act of the legislature and the constitution. Plainly the questions are not the same. An act of the legislature, as is recalled in the majority opinion, is a rule of action. So, in the same sense, is a provision of the constitution. When, therefore, a rule of action prescribed by the legislature conflicts with a rule of action prescribed by the constitution, and persons whose rights are affected call upon the court to determine which rule of action shall prevail, the court, in determining the question, but exercises its function of determining between the litigants what the law is; it but determines a question of law. But when the legislature enacts a law and declares that the law so enacted is necessary for the immediate preservation of the public peace, health or safety, support of the state government, or its existing institutions, it does not, by the declaration, prescribe a rule of action or enact a law. It but makes an assertion of fact; it but declares that certain facts exist which make it necessary that the rule of action already prescribed by it should take effect earlier than it would otherwise take effect but for the existence of the facts. When, therefore, the court determines whether the declaration is true or untrue, it determines a question of fact, or, at best, a mixed question of law and fact; it determines whether a fact asserted by the legislature does or does not exist.

It is this question of fact that I contend the court is without power to determine. The seventh amendment to the constitution vests the power to determine it in the legislature. It has given the courts no power to pass upon it in review. When, therefore, the court assumes that power, it, in my opinion, usurps its functions. No new principle in legislation is here involved. To make the rights of individuals depend upon certain facts, and vest the power to determine the existence of the facts in some board or person to the exclusion of the courts, is a common practice. Our own de-

cisions furnish abundant instances of it. For illustration I need but call attention to the cases of *State ex rel. Megler v. Forrest*, 13 Wash. 268, 43 Pac. 51; *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 53, 54 Pac. 774; *Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398; *Lawrence v. Potter*, 22 Wash. 32, 60 Pac. 147; *State ex rel. Abbott v. Ross*, 62 Wash. 82, 113 Pac. 273. If the legislature may in itself establish a tribunal to determine facts independent of the courts, I see no reason why the people in the constitution may not do so.

But I think the rule laid down for determining the existence of the fact less defensible than the rule permitting an inquiry into the fact's existence. The constitution does not, in the seventh amendment or elsewhere, require that the facts which give rise to the necessity for the immediate taking effect of an act be set forth in the body of the act. It is sufficient, even under the rule of the majority, to raise the inquiry of necessity if the legislature merely makes a declaration of necessity. It is manifest, therefore, that facts may exist which will give rise to the necessity of an immediate taking effect of an act which are not expressed on the face of the act, and are not of such public notoriety that the courts may take judicial notice of them. This being true, it seems to me to follow conclusively that the court, under the rule it has adopted, may declare acts not to be emergent which are gravely so and may declare acts to be emergent which have no emergency feature whatsoever.

An illustration may make the point more clear. Let us suppose that an insurrection exists against the authority of the state, and that the head of the revenue department of the state ("A" for example) is participating therein; that his participation is not generally or publicly known, but is suspected by the highest executive officer of the state, who makes his suspicions known privately to the legislature because some controlling reason exists for not making it publicly known; and that the legislature passes an act which

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"says no more than that 'A' shall give place to 'B' " in the revenue department, and "does not show wherein . . . 'A' if continued as a member would incite breaches of the peace or jeopardize the safety of the state, or that the presence of 'B' will give support to the state government." The act would contain all that the constitution requires it to contain, and the gravest necessity would exist for its taking effect immediately, yet the court would, under the rule it has adopted, at the suit of the offending officer, declare the act not emergent. On the other hand, the officer may be performing his duty loyally, with great ability, yet unfounded rumor, widespread because of the excitement of the times, falsely accuse him of disloyalty. Should the legislature under these conditions pass an emergency act removing him from office, the court would, under its rule, uphold the act, to the injury of a loyal citizen and to the detriment of the state.

A rule which will work these incongruous results, is, to my mind, in itself dangerous to the state. The court should either make no inquiry at all, or it should make the inquiry full and complete, even to the taking of testimony when necessary to ascertain the entire truth.

The third rule needs no comment. It is but the corollary of the other rules, and is unquestionably sound if they are sound. The existence of the state government, the peace, health and safety of the people, are paramount considerations, and laws passed with the view of their maintenance should be upheld if their validity is only merely doubtful.

But, without further pursuing this inquiry, and passing to the immediate question before the court, it will be observed that the court has determined that each of these five several acts present emergent conditions and that the legislature correctly so declared. Limited by the rule announced by the majority, I cannot accept these conclusions in their entirety. In my opinion, the act relating to motor propelled vehicles is clearly not emergent. The act is limited in its operation

to cities of the first class. The emergency declared is "the immediate preservation of the public safety." The act, as shown in the majority opinion, is not regulative in any sense that can be said to be conducive to the public safety. The act does not limit the speed at which the vehicles mentioned may be driven on the streets, it does not limit the number that may be operated, it does not require that the vehicles be run on regular routes or at regular intervals, it contains no provision against overloading, nor does it contain any provision directly designed to secure competency in the individuals who operate them. In fact, the act was not intended to be regulative in this sense. It was intended to provide a solvent fund from which persons injured by the negligent operation of the vehicles could recover damages. There may be a necessity for this, looking at it from the standpoint of the individual, but I am unable to understand how the creation of this fund can, in the remotest degree, contribute to the safety of the state.

The act relating to the division of revenues in cities of the first class, is likewise, in my opinion, not emergent. It was thought by the legislature to be necessary "for the immediate preservation of the public peace, health and safety." It simply prevents cities of the class named from diverting funds collected for one purpose to uses for other and different purposes. The act on its face gives no hint of any danger to the peace, health or safety of the public which makes it necessary that this act take effect immediately; and I confess to being ignorant of any conditions of which I may take judicial knowledge which so make it necessary. I can but conclude, therefore, that the court is in error in holding the act emergent.

The questions suggested and decided in the opinion to which this is attached differ from the questions presented in the opinions just noticed. These relate to clauses in the general appropriation bill, and it is held, as I understand it, that appropriations for the maintenance of the state and the

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state institutions are always emergent regardless of any declaration the legislature may make on the question. If this is the rule intended to be announced, I cannot subscribe to it. I think the people have the right of referendum against any act carrying an appropriation, whether for the support of the state and its institutions or otherwise, which is not in fact emergent. On this principle, the fund against which the claim of Blakeslee is presented is clearly not emergent. The others may or may not be so, depending upon facts not disclosed by the record. In my opinion, therefore, only the latter two ought to be held to be emergent.

[No. 12719. *En Banc*. April 22, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Lucy R.
Case, Plaintiff*, v. I. M. HOWELL, *as Secretary of State,
Respondent*.¹

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAW—CLASSIFICATION. The legislature may, as an exercise of the police power, enact laws which do in fact discriminate between citizens or classes of citizens, whenever the given legislation bears a reasonable relation to the preservation of the public peace, health, safety, or to the promotion of general welfare, since the constitutional prohibition against enactments denying equal protection of the laws to any citizen is no more vital and mandatory than the essential attribute of government to make laws protecting and promoting the general welfare.

STATUTES—ENACTMENT—REFERENDUM—EXCEPTIONS. The purpose of the exception to the power of referendum as guaranteed by the state constitution is to preserve unimpaired the right of the legislature to exercise the police power, without the delay attendant on a referendum of the law to the people, only in such cases where the necessity of its exercise may be emergent, and this question of emergency, in cases of doubt, should be treated as a legislative one, and the doubt resolved in favor of the declaration of emergency made by the legislative body.

¹Reported in 147 Pac. 1162.

STATUTES—ENACTMENT—REFERENDUM—EXCEPTIONS. Only laws invoking those certain, definite, and unquestioned phases of the police power which, in their very nature, usually are emergent, as those necessary for the immediate preservation of the public peace, health, or safety, and such measures as are essential to the preservation of these things, namely laws necessary for the support of the state government and its existing public institutions, have been excepted by the seventh amendment of the state constitution from the operation of the referendum.

CONSTITUTIONAL LAW—POLICE POWER—JUDICIAL QUESTION. Whether a given law is in reality a proper exercise of the police power is ultimately a judicial, not a legislative, question; and the necessity for a judicial check upon the exercise of the police power is not changed by the mere fact that certain phases of the power are selected and made an exception to a new constitutional guaranty.

CONSTITUTIONAL LAW—POLICE POWER—VALIDITY OF ACT—PRESUMPTIONS. When the propriety of an exercise of the police power is called in question, every presumption should be indulged in favor of the constitutionality of the legislation.

STATUTES — ENACTMENT — REFERENDUM — EXCEPTIONS. An act to protect from depletion by transfer or diversion funds collected by cities of the first class from sale of bonds or otherwise for any local improvement by special assessment, and the proceeds of bonds or other obligations authorized by a vote of the people for any special improvement or purpose, in its scope being intended to cover depletion of funds devoted to highway, sewage, and disposal of garbage purposes, as well as other purposes, directly relates to the preservation of the public health or safety, and may be reasonably deemed as so emergent in its character, as to warrant the legislature in enacting its immediate taking effect.

STATUTES—ENACTMENT—PRESUMPTIONS AS TO VALIDITY. Necessity for the enactment of a law prohibiting the diversion or transfer of special funds as a temporary loan is apparent, when it is an open question whether such transfer could be enjoined under a prior law.

Application filed in the supreme court March 29, 1915, for a writ of mandamus to compel the secretary of state to file an act proposed for submission to a referendum vote. Denied.

James E. Bradford, for plaintiff.

The Attorney General and *W. T. Dovell*, for respondent.

ELLIS, J.—This is an original application for a writ of mandate to compel the secretary of state to file five copies of

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an act of the recent legislature, called the Renick bill, together with the affidavit as provided by law relating to the referendum.

The respondent seeks to justify his refusal to file these papers on the single ground that the bill went into effect on its approval by the governor on February 26, 1915, by reason of the declaration in the act that it is necessary for the immediate preservation of the public peace, health and safety, and shall take effect immediately. The relator contends that the bill upon its face shows that it has no reasonable relation to these things, and is therefore subject to the referendum.

The act in question, so far as here material, is as follows:

"An act relating to cities of the first class and prohibiting therein the diversion of revenues secured for special purposes to other funds or uses, and declaring an emergency.

"Section 1. That whenever any city of the first class shall levy and collect moneys by sale of bonds or otherwise for any local improvement by special assessment therefor, the same shall be carried in a special fund to be used for said purpose, and no part thereof shall be transferred or diverted to any other fund or use. . . .

"Sec. 2. That whenever the issuance or sale of bonds or other obligations of any city of the first class shall have been authorized by vote of the people, as provided by any existing charter or laws, for any special improvement or purpose, the proceeds of the sale of such bonds including premiums if any shall be carried in a special fund to be devoted to the purpose for which such bonds were authorized, and no portion of such bonds shall be transferred or diverted to any other fund or purpose: . . ." Laws 1915, p. 43.

Section 3 declares that any ordinance, resolution, order or other action, and every city warrant or other instrument made in violation of the act, shall be void, and every officer, agent, or employee of any such city, and every private person or corporation who shall knowingly commit or aid in any violation of the act, shall be liable to the city for all money so transferred, diverted or paid out, which liability shall be

enforcible against the official bond of any such officer, agent, etc.

"Sec. 4. This act is hereby declared to be necessary for the immediate preservation of the public peace, health and safety, and shall take effect immediately." Laws 1915, p. 44.

The ultimate question for decision is this: Are the provisions of this bill so related to the immediate preservation of the public peace, health and safety or the support of the state government or its existing public institutions as reasonably to fall within the exception to the reserved power of referendum, as found in the seventh amendment to the state constitution? The constitutionality of the act in other particulars is not in issue, and will not be considered.

That amendment, section 1, article 2, subdivision "c," declares:

"No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted."

Subdivision "b" of the same section declares:

"The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions."

In order to simplify the discussion of the ultimate question, it may not be amiss to indulge certain general observations as to the purpose and character of the exception to the power of referendum reserved to the people by that amendment. Much confusion will be avoided by recognizing the plain fact that this is not the usual general emergency provision, but an *exception* to the otherwise universal application of the reserved power of referendum.

The constitution forbids the enactment of any law which shall deny to any citizen equal protection of the laws. That

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guaranty is as vital and mandatory as the guaranty of the right of referendum reserved by the seventh amendment, but no more so. But the power to make laws necessary to protect and promote the general welfare is an essential attribute of government. The legislature may, therefore, enact laws which do in fact discriminate between citizens or classes of citizens whenever the given legislation bears a reasonable relation to the preservation of the public peace, health, safety, or to the promotion of general welfare. Such laws are sustained as an exercise of the police power, which has been characterized as "the power inherent in every sovereignty . . . the power to govern men and things." *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 87 L. R. A. (N. S.) 466.

The clear purpose of the exception to the reserved power of referendum is to preserve unimpaired the right of the legislature to exercise this police power, but only in so far as it may be emergent. As pointed out in *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11, the exception does not extend to all things touching the general welfare. It does not extend to things relating to mere public expediency or public convenience. It is not as broad as the police power, which is so broad and so variant with time and circumstance that its limits cannot be defined.

"To say that the police power can only be exercised in given cases, and then call a halt, would be to fix a limitation which, from the very nature of the power itself, cannot be done." *Bowes v. Aberdeen*, 58 Wash. 535, 109 Pac. 369, 30 L. R. A. (N. S.) 709.

See, also, *Tacoma v. Boutelle*, 61 Wash. 434, 112 Pac. 661; *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645; *Commonwealth v. Alger*, 7 Cush. 53; *Slaughter House Cases*, 83 U. S. 36; *Stone v. Mississippi*, 101 U. S. 814; *Champer v. City of Greencastle*, 138 Ind. 339, 35 N. E. 14, 46 Am. St. 390, 24 L. R. A. 768.

Many acts of the legislature touching things directly relating to the general welfare, and hence falling unquestionably within the broad police powers, are in no sense emergent. A conspicuous example in this state is presented in the act of March 14, 1911 [Laws 1911, p. 345; 3 Rem. & Bal. Code, § 6604-1 *et seq.*] known as the workmen's compensation act, which is as far reaching and pervasive an exercise of the police power as can be found. Another is the act of March 20, 1913 [Laws 1913, p. 413; 3 Rem. & Bal. Code, § 7069-1 *et seq.*] known as the trading stamp act, which was passed subsequent to the adoption of the seventh amendment to the constitution and was sustained solely on the ground that it was a proper exercise of the police power. *State v. Pitney*, 79 Wash. 608, 140 Pac. 918.

But neither of these acts contained any declaration of an emergency, and obviously they were not emergent in any sense. Manifestly many acts involving the exercise of the police power in its broad sense relate to matters of public policy, which are, of all laws, the very kind most appropriate to be referred to the people and which the people would most desire to pass upon because they are put forth in the interest of the general welfare "in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion." *Noble State Bank v. Haskell*, 219 U. S. 104.

The framers of the seventh amendment to our state constitution, and the people by its adoption, have, therefore, selected and excepted from the operation of the referendum, only laws invoking those certain, definite and unquestioned phases of the police power which, in their very nature, may be and usually are emergent—in general terms "such laws as may be necessary for the immediate preservation of the public peace, health or safety," and specifically such measures as are essential to the preservation of these things, in that government is so essential; namely, laws necessary for "support of the state government and its existing public institutions." While this last phase of the exception may

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include some revenue laws and some appropriation laws, that is not the line of cleavage. The clear intention was to include within the exception any and all laws, and only such, as may be necessary for such support.

It is obvious that, had the courts at the start abdicated the power to pass upon the constitutionality of any act asserted by the legislature to be an exercise of the police power, every guaranty of the constitution, whether relating to life, liberty, property, or the equal protection of the laws, might long since have been overridden and made a dead letter by mere legislative fiat. Happily no court has done so, but all courts of review, both state and Federal, have uniformly and consistently held that, whether a given act is in reality a proper exercise of the police power is, in its ultimate, a judicial—not exclusively a legislative—question. Neither the character of the police power, nor the necessity for a judicial check upon its exercise, is changed by the mere fact that certain phases of the power are selected and made an exception to a new constitutional guaranty. It is still a judicial question. We so held in the *Brislawn* case, in which, quoting from the California Court of Appeals in *McClure v. Nye*, 22 Cal. App. 248, 133 Pac. 1145, we said:

“The said legislative declaration has no greater effect, and is no more binding upon the court, than if the legislature had declared that a certain measure is or is not constitutional. In such contingency that question would still remain for the courts to determine. The question before us is simply one of construction or interpretation of an act of the legislature and of a provision of the constitution, and that is a judicial question.”

What, in a given case, is a proper exercise of the police power is always a difficult question, by reason of the undefined nature of the limits of that power, but it is certainly no more difficult when applied to the narrower phases of the power which are made, by the seventh amendment, exceptions to the referendum than it is in its broader and general scope.

Being of the same nature, however, it must be determined on the same principles.

It may be asserted, as a general rule applicable to every phase of the police power, whether emergent or not, that, when the propriety of its exercise is called in question, the power will be sustained whenever the given measure has any "real substantial relations to the general good and welfare." *Sweet v. Rechel*, 159 U. S. 380.

"Every presumption should be indulged in favor of the constitutionality of the legislation." *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265.

"If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason. If no state of circumstances could exist to justify the statute, then it may be declared void because in excess of the legislative power." *State v. Pitney*, 79 Wash. 608, 140 Pac. 918.

We have already recognized the clear analogy, and declared the same rule, as to attempted legislative exception of laws from the operation of the referendum.

"If the act be doubtful, the question of emergency will be treated as a legislative question, and the doubt resolved in favor of the declaration of emergency made by the legislative body." *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11.

See, also, *State ex rel. Case v. Howell*, post p. 294, 147 Pac. 1159. Applying this principle to the statute here in question, can it be said that, indulging every presumption in favor of its constitutionality, the act has no reasonable relation to the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions? We think not.

It will hardly be questioned that the municipalities of the state, in the exercise of all those functions relating to the public peace, health, and safety, in short in the exercise of their police powers, are but arms, auxiliaries, or agencies of the state, performing governmental functions and exercising

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sovereign powers of the state. As said by the supreme court of the United States touching the relation between the state and its municipalities:

"Such corporations are the creatures, mere political subdivisions, of the state for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the state. They are, in every essential sense, only auxiliaries of the state for the purposes of local government." *Atkin v. Kansas*, 191 U. S. 207.

See, also, *Railroad Co. v. County of Otoe*, 16 Wall. 667; *Trustees of Schools v. Tatman*, 13 Ill. 28; *People v. California Fish Co.*, 166 Cal. 576, 138 Pac. 79; *City of Santa Monica v. Los Angeles County*, 15 Cal. App. 710, 115 Pac. 945; *Mayor and City Council of Baltimore v. Root*, 8 Md. 95, 63 Am. Dec. 692; *Scott v. Laporte*, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675.

While these decisions are broader in their assertion of legislative control over the affairs of municipal corporations than would be warranted in this state, by reason of the fact that our cities are guaranteed a large measure of local self-government by the constitution, they are none the less authority on the issue here, that municipalities, in all their governmental functions, are agencies of the state exercising sovereign powers of the state. *State ex rel. Clausen v. Burr*, 65 Wash. 524, 118 Pac. 639; *Meehan v. Shields*, 57 Wash. 617, 107 Pac. 835.

The highways of the state include the streets in the cities of the state. The streets are therefore subject to the paramount and primary control of the legislature. The existing highways of the state constitute one of the state's existing public institutions. *State ex rel. Blakeslee v. Clausen*, ante p. 260, 148 Pac. 28; *Cheney v. Barker*, 198 Mass. 356, 84 N. E. 492, 16 L. R. A. (N. S.) 436, quoted with approval

in *Brandt v. Spokane & Inland Empire R. Co.*, 78 Wash. 214, 138 Pac. 871, 52 L. R. A. (N. S.) 760.

“As the highways of a state, including streets in cities, are under the paramount and primary control of the legislature, and as all municipal powers are derived from the legislature, it follows that the authority of municipalities over streets, and the uses to which they may legitimately be put, depends, within constitutional limitations, entirely upon their charters or the legislative enactments applicable to them.” 3 Dillon, *Municipal Corporations* (5th ed.), § 1161.

The power of the city to levy special assessments to pay for the improvement and maintenance of streets is referable solely to the sovereign power of taxation, delegated to it by the state under direction of the constitution, art. 7, § 9; Rem. & Bal. Code, § 7507, subds. 10, 13 (P. C. 77 § 88). *Malette v. Spokane*, 77 Wash. 205, 137 Pac. 496, 51 L. R. A. (N. S.) 686.

“However, it is now settled in the Federal courts, and in the courts of last resort of practically every state of the Union which recognizes the power of special assessment, except Colorado, that all such assessments are laid under the taxing power.” Hamilton, *Law of Special Assessments*, p. 38, § 49.

In the construction and maintenance of the street, the city performs a governmental function through the exercise of sovereign power of the state.

“Familiar examples of such governmental duties are the duty of preserving the peace, and the protection of property from wrong-doers, the construction of highways, the protection of health and the prevention of nuisances.” *Hart v. City of Bridgeport*, 13 Blatchf. (U. S.) 289, 293, Fed. Cas. No. 6,149.

“The opening, construction and maintenance of public highways is purely a governmental function, whether done by the state directly or by one of its municipalities, for which the state is primarily responsible. And it is immaterial whether such public work is paid for by the state, the county, the city, or by the benefited property owners. It is a work of

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a public, not private, character. The manner of payment does not change the character of the work." *Byars v. State*, 2 Okl. Cr. 481, 102 Pac. 804, Ann. Cas. 1912 A. 765.

It will be noted that the Renick act is intended to protect from depletion by transfer or diversion two kinds of funds of cities of the first class; (1) funds collected by sale of bonds or otherwise for any local improvement by special assessment; (2) proceeds of bonds or other obligations of such cities authorized by a vote of the people for any special improvement or purpose. By a simple paraphrase of either of these provisions, it becomes manifest that they protect funds essential to the immediate preservation of the public health or public safety, and at least one of the existing public institutions of the state. Suppose the first section read:

"That whenever any city of the first class shall levy and collect moneys by sale of bonds or otherwise for (the construction of a sewer system) by special assessment therefor, the same shall be carried in a special fund to be used for said purpose, and no part thereof shall be transferred or diverted to any other fund or use;"

no one would say that such a statute would not directly relate to the preservation of the public health or safety, and no one can say that it would not be reasonably necessary to the *immediate* preservation of these, since an adequate sewer system is a constant and continuing necessity, hence always an immediate one to any city.

A like paraphrase of the second section might also include a plan for disposition of garbage, and adequate means for the disposition of garbage is also a present and continuing, hence an immediate necessity. And again, by inserting the words "public streets, bridges and highways" in each of these sections as the specific purpose of the fund, it is obvious that the act would then protect a fund intended to support a part of one of the state's existing institutions, namely, an integral and essential part of the state's system of highways. It is true that neither section of the act is thus limited to

these specific purposes, but both sections include these purposes in general terms; hence the act is intended to protect from depletion funds devoted to these purposes as well as others. The act thus clearly falls within the exception to the referendum as a law which "may be necessary for the immediate preservation of the public . . . health or safety, support of . . . existing public institutions." At least we cannot say that, on its face, it has no reasonable relation to those purposes which is, as we have seen, the judicial test of the proper exercise of the police power.

Finally, the relator's argument that there is no necessity for the Renick act in that a diversion of special funds may be enjoined under the prior law, does not meet the case. Under the prior law, as declared in *Griffin v. Tacoma*, 49 Wash. 524, 95 Pac. 1107, and *Scott v. Tacoma*, 81 Wash. 178, 142 Pac. 467, temporary transfers from one fund to another were permissible. True, neither of these cases related to transfers from special funds, but whether transfers as loans from special funds would be sustained as valid is an open question, in the light of those decisions. Looking, then, to the old law, the mischief, and the remedy, it is clear that the Renick act is intended to prevent a depletion, not only by permanent "diversion," but also by "transfer" as a loan or for any other purpose, of any fund created in the manner and for the purposes mentioned in that act.

The writ is denied.*

MAIN, HOLCOMB, and PARKER, JJ., concur.

MORRIS, C. J., MOUNT, and CROW, JJ. (concurring)—We concur in the result because in our opinion the question of emergency is a legislative and not a judicial question.

CHADWICK, J. (concurring)—I had been disposed to hold that the Renick bill did not fall within the exceptions to the

* N. B.—For dissenting opinion of Judge Fullerton, see *ante* p. 276.—Rep.

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constitution, but Judge Ellis' argument has at least raised a doubt in my mind, and following the accepted rule in such cases, I have decided to concur in his opinion.

Judge Fullerton reargues the main case. It seems to me that he has failed to appreciate our holding. It is not a question whether an act is emergent, as a matter of fact, but whether it falls within the exceptions to the seventh amendment. This is a complete answer to Judge Fullerton's general dissent in the *Blakeslee* case (*State ex rel. Blakeslee v. Clausen*, ante pp. 260, 276, 148 Pac. 28). Suppose, for instance, the legislature passed an act plainly impairing the obligation of an antecedent contract and should specifically declare that it had not done so. This would raise a mixed question of law and fact which from the earliest history of our jurisprudence, courts have assumed to pass on; a power which Judge Fullerton indorses, citing the case of *Marbury v. Madison*, 1 Cranch 137, *et alterius*. To say that in the one case we pass upon a fact, and in the other that we do not, is a refinement so subtle that I confess my inability to mark or measure it. Neither does the opinion in the *Blakeslee* case deny the right of referendum upon bills carrying an appropriation. We have there sufficiently marked the distinctions which naturally arise under the constitution, and this feature of his dissent requires no comment.

[No. 12720. *En Banc*. April 22, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Lucy R.*
Case, Plaintiff, v. I. M. HOWELL, *Secretary of State,*
*Respondent.*¹

STATUTES — REFERENDUM — TIME OF TAKING EFFECT—EMERGENCY. The legislative enactment (Laws 1915, p. 227) for the regulation of motor propelled vehicles along streets and highways as common carriers of passengers by requiring the persons so operating them to take out permits and execute surety bonds to pay all damages sustained by persons injured in the conduct of the business of transporting passengers, and by providing for civil actions to recover against the carrier and his bondsman for the negligence of the carrier, is an attempt at regulation, even if not wholly adequate; and if a state of facts can reasonably be presumed to exist which would justify the legislation, courts must presume that the law was passed for that reason as an exercise of police power; and, its necessity being doubtful, the question of emergency will be treated as a legislative question, and the doubt resolved in favor of the declaration of emergency made by the legislative body.

SAME. The declaration of immediate emergency existing at the date of the enactment of a law, followed by the declaration that it shall take effect thirty days thereafter, is not such a contradiction in terms as to make invalid the emergency provisions; since laws take effect immediately, although their operation may be deferred for a time, and the intent of the law was merely to give those affected a reasonable period of time in which to adjust themselves to the changed condition effected by the law.

SAME. The word "immediate," as used in art. 2, § 1, subd. b, of the state constitution excepting from the right of referendum emergency legislation in matters of the "preservation of public peace, health or safety," does not import the exclusion of any interval of time, but there is a certain latitude to be given the significance of the word, and it may mean "close to" the time of enacting the law, and that it is within the power of the legislature to cause it to take effect at a future date with reference to the operation of the act.

Application filed in the supreme court March 29, 1915, for a writ of mandamus to compel the secretary of state to

¹Reported in 147 Pac. 1159.

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file an act proposed for submission to a referendum vote. Denied.

Hugh C. Todd, Ashton Dovell, and Thomas Corkery, for relator.

The Attorney General, for respondent.

HOLCOMB, J.—The legislature of the state at its session just closed passed an act entitled:

“An act relating to and regulating common carriers of passengers upon public streets, roads and highways, providing for the issuance of permits; prescribing penalties for violations, and providing when this act shall take effect.” Laws 1915, p. 227.

Section 1 of the act provides that it shall be unlawful to engage in the business of carrying or transporting passengers for hire in any motor propelled vehicle along any public street, road or highway within the corporate limits of any city of the first class, without having first obtained the permit as mentioned in the subsequent sections. Section 2 provides that every person, firm or corporation, desiring to engage in the business of carrying or transporting passengers for hire in any motor propelled vehicle over and along any public street, road or highway in any city of the first class, shall apply to the secretary of state for a permit so to do. For each motor vehicle intended to be operated, the applicant shall deposit and keep on file with the secretary of state a surety company bond, running to the state of Washington, in the penal sum of \$2,500, to be approved by the secretary of state, conditioned for the faithful compliance by the principal with the provisions of the act, and to pay all damages which may be sustained by persons injured by reason of any careless, negligent, or unlawful act on the part of the principal, his agents or employees, in the conduct of his business in transporting passengers, and this section further provides for the payment of a fee of five dollars to the secretary of state. Section 3 provides that every person injured by the

careless, negligent or unlawful act of any person or corporation operating under such permit, or his personal representatives named in the act, shall have a cause of action against the principal and the surety upon the bond for the amount of damages sustained. The liability of the surety, however, is expressly limited to the amount of the bond. Section 4 provides that every person or corporation operating any motor propelled vehicle without the requisite permit shall be guilty of a gross misdemeanor. Section 5 provides that, if any part of the act is held invalid by any court, the remainder of the act shall nevertheless be valid. Section 6 provides:

"This act is necessary for the immediate preservation of the public safety, and shall take effect April 10, 1915." Laws 1915, p. 229.

The relator in this case claims the right to have this act referred to a vote of the people. To that end, as she alleges in her application, she has offered to the secretary of state, for filing, the requisite affidavit. The secretary of state, believing that the legislative declaration that the immediate preservation of the public safety requires that the act shall take effect April 10, 1915, is operative, and results in the act not being subject to a referendum vote, declined to receive and file the documents tendered. This action in mandamus is prosecuted to compel the secretary of state to accept and file the proffered documents. The secretary of state has demurred to the affidavit on the ground that it fails to state facts sufficient to constitute a cause of action. Without waiving the demurrer, an answer has been interposed.

I. In *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11, we held:

"The true rule is: the referendum cannot be withheld by the legislature in any case except it be where the act touches the immediate preservation of the public peace, health, or safety, . . . If the act be doubtful, the question of emergency will be treated as a legislative question, and the doubt resolved in favor of the declaration of emergency made by the legislative body."

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The relator contends that the act in question nowhere touches any of the conditions justifying the emergency clause.

An act of the legislature of a state is only to be overthrown by virtue of some specific limitation or prohibition in the paramount law. *Forsythe v. City of Hammond*, 68 Fed. 774; *Jacobson v. Massachusetts*, 197 U. S. 11. If, as laid down in the *Brislawn* case, it manifestly appeared on the face of the act that there was no touching of the public peace, health or safety, then such legislative dissimulation would not support a mere declaration thereof, for it is only in cases of obvious and undoubted legislative dissimulation as regards the police power that such legislation cannot and should not be upheld by the courts. *State ex rel. Brislawn v. Meath*, *supra*; *Mugler v. Kansas*, 123 U. S. 623; *Sentell v. New Orleans etc. R. Co.*, 166 U. S. 698; *Hawker v. New York*, 170 U. S. 189; *Holden v. Hardy*, 169 U. S. 366. And, as was stated in *Mugler v. Kansas*, *supra*:

"The courts are not bound by mere forms, nor are they misled by mere pretences. They are at liberty—indeed, are under the solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to promote the public health, the public morals, or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

On the other hand, however, it is equally well settled that the courts should not declare a law repugnant to the constitution without a strong conviction divested of all reasonable doubt. *Ah Lim v. Territory*, 1 Wash. 156, 24 Pac. 588, 9 L. R. A. 395. The existence of a reasonable doubt acquits an act of violence to the constitution. "Where doubt exists . . . the act is sustained." *State ex rel. School Dist. No. 24 v. Grimes*, 7 Wash. 270, 34 Pac. 836. Now the act in

question does two things of importance as legislative functions, viz.: (1) it recognizes a new sort of common carrier; and (2) it enacts a system of regulation of such common carriers. It is true that it does not limit the speed of such passenger cars, nor the number to be permitted on given streets, nor the capacity of the car, nor the routes, nor rules of the road. It does, however, regulate them to the extent of requiring them to obtain permits from the secretary of state to operate, and to furnish a surety bond in a specified amount to the approval of the licensing officer, with specified conditions therein; and provides for civil actions to recover against the carrier and the bond for any injury occasioned by the negligence or unlawful act of such carrier.

The question of the validity of the act as a whole is not before us, not being raised by such proceeding as this. Nor is the question of the wisdom, policy, expediency, or effectiveness of the law. The reasonable regulation of common carriers by legislation has always been recognized as a proper exercise of the police power touching the safety and the welfare of the public. No citation of authorities is deemed necessary to sustain the above statement in these terms. Whatever, therefore, may be the general effectiveness of this law as to regulating such common carriers, it certainly can be said with conviction that it is an attempt at such regulation. For instance, it may have the effect of limiting the number of such carriers upon the streets by the restraints put upon them; and it may conduce to the safety of passengers carried by such vehicles and others upon the streets by the restraints placed upon them. At all events, the body of the act certainly bears all the semblance of an attempted exercise of police power, and of coming within the excepted provisions of the seventh amendment to the constitution. We may assume that there are such carriers as are referred to in the act. We may assume that there are conditions existent which justify legislation for their regulation; and, as was stated in *State v. Pitney*, 79 Wash. 608, 140 Pac. 918, per Main, J.:

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"If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason. If no state of circumstances could exist to justify the statute, then it may be declared void because in excess of the legislative power."

That is the correct principle adhered to in this state, and concurred in by almost all the courts, both Federal and state. Whatever may be thought of the expediency of the statute, it cannot be affirmed to be, beyond question, in palpable conflict with the provisions of the seventh amendment to the constitution.

II. But relator further contends that the declaration that the emergency exists at the date of the enactment on March 10, 1915, followed by a provision that it shall take effect on April 10, 1915—thirty days thereafter—is a manifest contradiction by the legislature of its own declaration of an immediate emergency. The true rule is that the law takes effect immediately, although its operation is deferred for a time. *Hanson v. Hodges*, 109 Ark. 479, 160 S. W. 392.

The intention of the legislature probably was, as is manifestly just sometimes in cases of new legislative activity, to give those affected by the law a reasonable period of time in which to adjust themselves to the changed condition of the law. Those concerned know the law is immediately in effect, but that they are given until a fixed date to adjust themselves thereto before any of the provisions of the law will be set in operation against them. The word "immediate" however, as used in subd. "b" of § 1, art. 2 of the seventh amendment to the constitution, "the immediate preservation of the public peace, health or safety," does not necessarily have an arbitrary sense of *instantly, forthwith, or without any intervening lapse of time whatever*.

"'Immediately' does not, in legal proceedings, necessarily import the exclusion of any interval of time. It is a word of no very definite signification, and is much in subjection to its

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grammatical connections." *Gaddis v. Howell*, 31 N. J. L. 313.

So, in this case, we may consider that there is a certain latitude to be given the significance of the word in its connection and use in the constitution, and it may mean *close to* the time of enacting the law, and that it is within the power and discretion of the legislature to cause it to take effect at a future date with reference to the operation of the act.

We therefore conclude that the demurrer of respondent should be sustained, and the writ denied.

It is so ordered.*

MAIN, ELLIS, PARKER, and CHADWICK, JJ., concur.

MORRIS, C. J., MOUNT, and CROW, JJ. (concurring)—We concur in the result, because the question whether an emergency exists is a legislative question. The legislature having decided the fact, this court is concluded thereby.

*N. B.—For dissenting opinion of Judge Fullerton, see *ante* p. 276.—Rep.

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Opinion Per MORRIS, C. J.

[No. 12738. Department One. April 23, 1915.]

S. M. JACKSON *et al.*, *Appellants*, v. COMMERCIAL WATERWAY
DISTRICT NO. 1, OF PIERCE COUNTY, *et al.*, *Respondents*.¹

NAVIGABLE WATERS—COMMERCIAL WATERWAY DISTRICTS—ESTABLISHMENT—PETITION. A petition for the establishment of a commercial waterway district cannot be attacked because not signed by the wives of petitioners owning community lands in the district, where the wives signed and acknowledged a statement that their husbands had been given prior authority to sign the petition and to represent their interests in the proceedings; as the same shows both previous authority and subsequent ratification.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 11, 1915, upon sustaining a demurrer to the complaint, dismissing an action to annul the organization of a commercial waterway district, tried to the court. Affirmed.

C. M. Riddell, for appellants.

John D. Fletcher, for respondents.

MORRIS, C. J.—Action to annul the organization of commercial waterway district No. 1 of Pierce county, and to enjoin respondent commissioners from acting as commissioners of such district. The validity of the district organization is attacked solely upon the grounds that certain community lands were included in the proposed district, and that the petition initiating the formation of the district was signed by the husbands alone, it being asserted that excluding such lands from the petition will leave less than the requisite area represented by the petition. It being conceded that the statute relating to the formation of such districts has been complied with, and no objection has been made at any stage of the proceeding, it is doubtful whether these appellants are now in a position to raise any question other than the constitutionality of the law involved, since the petition is not a

¹Reported in 147 Pac. 1140.

jurisdictional prerequisite, and ample opportunity was afforded appellants to appear and enter their objections, if any, which they have neglected to avail themselves of. *North-ern Pac. R. Co. v. Pierce County*, 51 Wash. 12, 97 Pac. 1099, 23 L. R. A. (N. S.) 286; *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010; *Chandler v. Puyallup*, 70 Wash. 632, 127 Pac. 293. We will, however, pass this question, as we do not find its answer necessary to a decision of the case.

We find attached to the complaint as an exhibit an acknowledgment signed by the respective wives of the husbands who signed the petition in behalf of community lands, in which, referring to such petition, it is acknowledged that the same "was filed with my prior authorization and consent, and the signature to the same, by my husband as a petitioner thereon, was with my prior authorization and consent, with full authority as my agent and representative, and as the agent and representative of the marital community, in so far as I, individually or as a member of the marital community, have or had any interest in any lands described in said petition; he also having authority to represent said lands and any interest that I, as an individual or a member of the marital community, had or have in the same at any and all hearings before the board of county commissioners of said Pierce county." This shows both a previous authority and a subsequent ratification, and is ample to bind the interest of the wives to the same extent as though they had signed the original petition. *Washington State Bank of Ellensburg v. Dickson*, 35 Wash. 641, 77 Pac. 1067; *Bowers v. Good*, 52 Wash. 384, 100 Pac. 848; *Koth v. Kessler*, 59 Wash. 641, 110 Pac. 540.

The objection against the inclusion of community lands in the petition is not well taken, and the judgment is affirmed.

HOLCOMB, CHADWICK, MOUNT, and PARKER, JJ., concur.

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Statement of Case.

[No. 12042. Department Two. April 29, 1915.]

**GERSHOM McFERON *et al.*, Respondents, v. FIDELITY &
DEPOSIT COMPANY OF MARYLAND *et al.*, Appellants.¹**

APPEAL—SUPERSEDEAS BOND—LIABILITY—CONDITION OF BOND. Under our statute permitting joint appeals, and prescribing but one form of supersedeas bond whether the appeals be joint or several, and providing that the supreme court on appeal may affirm, reverse or modify the judgment appealed from as to any or all of the parties, a surety on an appeal and supersedeas bond, is not released from liability to perform the judgment by a reversal of the judgment as to one of the appellants, where the bond was conditioned to bind the surety as to any judgment rendered against the appellants.

APPEAL—SUPERSEDEAS BOND—LIABILITY—JUDGMENT—FINALITY—ALTERNATIVE CONDITIONS—REASONABLE TIME FOR ELECTION. In an action for rescission of a trade, a judgment setting aside a conveyance as fraudulent, and providing a condition by which the defendants could place themselves *in statu quo*, and as an alternative directing that judgment should go against them in a fixed sum and that execution could issue therefor, is not a conditional judgment, but is final, so as to fix the liability of sureties on a supersedeas bond, although no time was fixed for the exercise of defendants' option; since a reasonable time was implied.

SAME—FINALITY—ALTERNATIVE CONDITIONS—APPEAL—LIABILITY OF SURETY. In such a case, refusal of the supreme court, on affirming the judgment, to direct judgment against the sureties on the supersedeas bond, does not affect the finality of the judgment, or prevent the liability of the surety from attaching, after the expiration of a reasonable time for defendants to comply with the conditions tendered in the judgment.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered April 7, 1914, upon findings in favor of the plaintiffs, in an action on a supersedeas bond, tried to the court. Affirmed.

Marion A. Butler, for appellant.

Samuel R. Stern, for respondents.

¹Reported in 148 Pac. 14.

FULLERTON, J.—On July 27, 1911, the respondents, McFeron and wife, began an action in the superior court of Spokane county against the appellant Shoemaker, to rescind, on the ground of fraud, an executed contract wherein the respondents had been induced to convey certain real property owned by them to Shoemaker in exchange for certain personal property, consisting of money, promissory notes, and shares of stock in a wireless telephone and telegraph company. On the trial of the action, it appeared that the grantees in the deed had, between the date of the conveyance and the commencement of the action, mortgaged the real property as security for the sum of \$6,000. The respondents recovered in the action; the judgment providing for a rescission of the conveyance and for a redelivery of the consideration given in exchange therefor. The conditions of the rescission were expressed in the decree as follows:

“(5) That the said plaintiffs shall surrender to the defendants the trustee’s certificate No. 1672, representing ten thousand shares of the Continental Wireless Telephone & Telegraph Company in lieu of the certificates theretofore surrendered by the plaintiffs in the said Collins Company and also the unpaid Murphy notes and when the said defendants shall secure a release of the mortgage given to the Northwestern and Pacific Hypotheekbank for the sum of six thousand dollars, that then the plaintiffs shall simultaneously therewith pay to the said defendants the sums of money which plaintiffs have received from said Fred H. Shoemaker, including the said sum of fifteen hundred dollars, paid by check, and the various sums paid upon the notes, less any protest fees, or charges of that kind, paid by the said plaintiffs, as shown by the notices attached to the said notes, amounting to \$5.65.

“(6) In the event that the said defendants fail to secure a release of said mortgage, then the plaintiffs may retain the amounts which they have received, and may have judgment for the sum of \$1,865.65, representing the difference between the amount of said mortgage indebtedness against the property herein described and the amounts received by the

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plaintiffs from all sources and on account of the exchange and protest fees paid and may have execution therefor."

On the entry of the judgment, the defendants in the action appealed therefrom to this court, giving a supersedeas bond with the appellant in the present action, Fidelity and Deposit Company of Maryland, as surety. The appeal resulted in a reversal of the judgment in so far as it provided for a personal judgment against the wife of Shoemaker, but in its affirmance in all other particulars. *McFeron v. Shoemaker*, 73 Wash. 450, 131 Pac. 1126. The court, however, remanded the case without directing a judgment in any form against the surety on the supersedeas bond. On the return of the remittitur, the judgment was modified in accordance with the direction of this court, and thereafter the judgment debtors complied with the judgment in so far as to reconvey to the respondents the real property received by them, but did not release or offer to release the mortgage thereon, nor did they pay to the respondents in lieu thereof, as they were required to do in the judgment, the sum of \$1,865.65. The present action was begun by the respondents against the surety company to recover on the supersedeas bond the last mentioned sum. Issue was joined on the complaint and a trial had, resulting in a judgment against the surety company for the amount demanded, with interest. From this judgment, the present appeal is prosecuted.

While the appellant has made a number of assignments of error, but two questions are discussed in that part of its brief devoted to the argument. It is contended, first, that the appellant was released from its obligation on the appeal bond because of the partial reversal by this court of the judgment which the bond was given to supersede. The contention is rested on the ground that the language of the bond is joint in form; that, while the bond is conditioned to bind the surety as to judgments and orders rendered or made, or ordered to be rendered or made, against the appellants jointly on the appeal, it is not conditioned to bind the

surety to judgments or orders made, or directed to be made, against them severally. The case of *Marsh v. Byrnes*, 7 Cinn. L. Bul. (Ohio) 345, is cited as sustaining the contention. Seemingly, the case does so, but it was based on the case of *Lang v. Pike*, 27 Ohio St. 498, which we find was overruled in the later case of *Alber v. Froehlich*, 39 Ohio St. 245. But we could not accept the contention as controlling in any event. Our statute permits of joint appeals, and further provides that the supreme court may on the appeal affirm, reverse, or modify the judgment appealed from as to any or all of the parties. It provides for but one form of bond, conditioned in but one way, whether the appeal be joint or several. Since the bond in question was given pursuant to this statute and is conditioned as prescribed therein, it would be a perversion of its purpose and meaning to hold that, because the bond referred to the appellants jointly, instead of jointly and severally, it is insufficient to secure the respondents in so much of the judgment as was awarded in their favor.

The next contention is that the judgment is conditional, and cannot be enforced until it is reduced to a finality, definite and certain in its terms. But we think the judgment final rather than conditional. True, it contained optional conditions, concerning which the judgment creditors had the liberty of choice, but it was clearly the final determination of the rights of the parties to the action. It set aside the conveyance as fraudulent, provided a condition by which the defendants could place themselves *in statu quo*, and, as an alternative, provided that judgment should go against them in a fixed sum and that execution could issue therefor in case they did not comply with the conditions. No time was fixed in the judgment, it is true, within which the defendants were required to make their choice, but a reasonable time was implied, and after such reasonable time, execution could issue for the money judgment. But it is said that the refusal of this court to direct a judgment against the surety on

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Syllabus.

the supersedeas bond on remanding the cause on the first appeal is in effect a determination that the judgment was not final, and prevents an action upon the bond. We cannot so consider it. Since the judgment debtors had a reasonable time after the affirmance of the judgment to exercise the option granted them, this court could not well direct a judgment against the sureties on the supersedeas bond before that time expired. But we see no reason why this fact prevents the judgment creditors from maintaining an action on the bond when such reasonable time elapsed after the remand.

We find no error in the record, and the judgment will stand affirmed.

MOUNT, MAIN, PARKER, and ELLIS, JJ., concur.

[No. 12215. Department One. April 29, 1915.]

ERNEST KUEHL, *Respondent*, v. THE CITY OF EDMONDS,
Appellant.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—LIMITATIONS—ESTIMATED COST—REASSESSMENT—POWER OF CITY AND LEGISLATURE—REPEAL OF LAW—EFFECT. Where a local improvement was made by a third-class city, under Rem. & Bal. Code, § 7705, limiting the city's power of assessment to an amount equal to the estimated cost, the property owner may rely thereon as a limitation on the jurisdiction of the city, and the legislature cannot, by a subsequent act, repeal the limitation as to improvements already made; hence the act of 1911, 3 Rem. & Bal. Code, §§ 7892-42, 7892-43, repealing § 7705 and authorizing the city to make supplemental or reassessments to cover the actual cost of the improvement can have no application to an improvement previously made under the limitation of § 7705, and confers no power on the city to reassess for any sum in excess of the estimate.

SAME—CURATIVE ACTS. Authority to make a reassessment under such act cannot be sustained on the theory of the power to pass curative acts, since there was no invalidity within the limitation, which subsequent legislation could not change after it had been acted upon by both the city and the property owner.

Reported in 148 Pac. 19.

SAME — ASSESSMENTS — OBJECTIONS — WAIVER — JURISDICTIONAL QUESTIONS. Where a local improvement was made by a third-class city under Rem. & Bal. Code, § 7705, which limited the city's power of assessment to an amount equal to the estimated cost of the improvement, the failure of property owners to object at certain stages of the proceedings does not preclude them from raising the jurisdictional objection that the assessment exceeded the cost of the improvement; especially where, by 3 Rem. & Bal. Code, §§ 7892-42, 7892-43, the property owners were only permitted to raise objections to the existence and amount of the benefits.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered May 27, 1914, in favor of the plaintiff, setting aside a reassessment on appeal from the order of the city council confirming the roll. Affirmed.

Preston & Thorgrimson and Turner & Hartge, for appellant.

Earl W. Husted, for respondent.

CHADWICK, J.—In 1909, the city of Edmonds provided by ordinance for the improvement of Dayton street. It was held in the case of *Peabody v. Edmonds*, 68 Wash. 610, 123 Pac. 1018, that an assessment to the extent of \$6,025.74 would be valid. This case followed, and was decided upon the authority of, *Chehalis v. Cory*, 54 Wash. 190, 102 Pac. 1027, 104 Pac. 768. We understand from the record that an assessment was levied and payments have been made by individual property owners in accordance with the judgment of this court. Reference to our former decision will show that the estimated cost of the improvement was \$6,025.74, whereas the actual cost was \$8,317.33. The former judgment took no account of interest which had accumulated upon the warrants from the date of their issuance up to the time of levying the assessment, which amounted to \$1,366.

The legislature, at its session held in 1911, rewrote the law authorizing reassessments for public improvements, and in terms repealed that section of the statute, Rem. & Bal. Code, § 7705, wherein cities of the third class were limited in their

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power of assessment to an amount within or equal to the estimated cost. The power to reassess and the conditions warranting a reassessment are contained in §§ 42 and 43 of the act, the material parts of which we have quoted and italicized in such manner as to best emphasize the contentions of the appellant:

"In all cases of special assessments for local improvements, wherein said assessments have failed to be valid in whole or in part for want of form or insufficiency, informality, or irregularity or nonconformance with the provisions of law, charter or ordinance governing such assessments in any city or town, the council of any such city or town shall have power to reassess such assessments and to enforce their collection in accordance with the provisions of law and ordinance existing at the time the reassessment is made.

"Whenever, on account of any mistake, inadvertence or other cause, the amount assessed shall not be sufficient to pay the cost and expense of the improvement made and enjoyed by the owners of property in the assessment district where the same is made, the council of such city or town is authorized and directed to make reassessments on all the property in said assessment district to pay for such improvement; such assessment to be made in accordance with the provisions of law and ordinance existing at the time of its levy. Any city or town is hereby authorized to assess or reassess all property which the council shall find to be specially benefited to pay the whole or any portion of the cost and expense of any local improvements which such city or town has heretofore made, is now making, or may hereafter make at the expense in whole or in part of property specially benefited thereby, whether or not such property so to be assessed or reassessed abuts upon, is adjacent to, or proximate to such improvement, or was included in the original district; and the right to so assess all property so found to be specially benefited shall also apply to any supplemental assessment or reassessment which such city or town may find it necessary to make for the purpose of providing for any deficiency in any local improvement district fund caused by the invalidity of any portion of the original assessment in such improvement district, or where for any cause the amount originally as-

essed shall not be sufficient to pay the cost of the improvement.

"Whenever any assessment for any local improvement in any city or town, whether the same be an original assessment, assessment upon omitted property, supplemental assessment or reassessment, heretofore or hereafter made, has been or may hereafter be declared void and its enforcement [refused] by any court, or for any cause whatever has been heretofore or hereafter may be set aside, annulled or declared void by any court, either directly or by virtue of any decision of such court, the council of such city or town shall make a new assessment or reassessment upon the property which has been or will be benefited by such local improvement, based upon the actual cost of such improvement at the time of its completion. . . .

"The fact that the contract has been let or that such improvement shall have been made and computed in whole or in part shall not prevent such assessment from being made, *nor shall the omission, failure or neglect of any officer or officers to comply with the provisions of law, the charter or ordinances governing such city or town, as to petition, notice, resolution to improve, estimate, survey, diagram, manner of letting contract or execution of work, or any other matter whatsoever connected with the improvement and the first assessment thereof, operate to invalidate or in any way affect the making of any assessment authorized in the preceding section:* Provided, That such assessment shall be for an amount which shall not exceed the actual cost and expense of the improvement, together with the accrued interest thereon, it being the true intent and meaning of this act to make the cost and expense of local improvements payable by the property specially benefited thereby, notwithstanding the proceedings of the council, board of public works or other board, officer or authority of such city or town may be found irregular or defective, whether jurisdictional or otherwise; when such assessment is completed, all sums paid on the former attempted assessment shall be credited to the property on account of which the same were paid." Laws of 1911, ch. 98, pp. 441, 468, 469, §§ 42, 43; 3 Rem. & Bal. Code, §§ 7892-42, 7892-43.

It will be seen that the legislature has attempted to grant a power to make a reassessment, or, as is sometimes said in

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the body of the act, a supplemental assessment, and that it shall not be prevented from so doing because of

“the omission, failure or neglect of any officer or officers to comply with the provisions of law, the charter or ordinances governing such city or town, as to petition, notice, resolution to improve, *estimate*, survey, diagram, manner of letting contract or execution of work, or any other matter whatsoever connected with the improvement and the first assessment thereof, operate to invalidate or in any way affect the making of any assessment authorized in the preceding section.” 3 Rem. & Bal. Code, § 7892-43.

The only limitation being that the reassessment shall not put a burden upon the property already assessed, beyond actual costs and expenses of the improvement, together with accrued interest.

After our former decision had been pronounced, we were asked to recall the remittitur and to make some suggestion with reference to remedies. This the court declined to do. *Peabody v. Edmonds*, 72 Wash. 604, 131 Pac. 250. Those interested in securing payment for the work done thereupon induced the council of the city of Edmonds to levy an assessment under the authority which it is contended was given by the legislature in 1911, to cover the difference between the estimated cost and the actual cost of the improvement. There is no showing in this case that the council acted fraudulently or are in any way guilty of bad faith. It is a question of power only. When the supplemental assessment had been made, interested property owners appealed from the order of the council to the superior court. The superior court held that the council had no power to make a reassessment, and further, that our former decision was *res judicata* of the amount which could be lawfully assessed against the property. Many of our decisions are cited and discussed, but it seems to us that the question to be decided has never been before the court.

We have held in several cases that it is within the power of the legislature to put a limitation upon the power of a

city council to proceed in matters of this kind. The power to limit the amount of the assessment and the reasons for sustaining such limitations are adverted to in *Van Der Creek v. Spokane*, 78 Wash. 94, 138 Pac. 560, and *Chehalis v. Cory*, *supra*.

The basis of appellant's contention is that the power of reassessment given under the act of 1911 is remedial, and inasmuch as the legislature might have dispensed with the requirement that the cost of the improvement should not exceed the estimated cost in the first instance, it can now say that a failure to comply with such a limitation should not be a bar to a reassessment to cover the difference between the actual cost and the estimated cost, so long as the estimated cost does not exceed the value and amount of benefits.

The supplemental proceedings and the ordinance effectuating it proceed upon the theory that the property "was benefited in an amount at least equal to the entire cost of said improvement;" that is to say, the council assumed that the limitation contained in Rem. & Bal. Code, § 7705, as construed in the case of *Chehalis v. Cory*, was repealed in so far as past improvements and those in process of completion are concerned.

It would seem to us that, if this had been the intention of the legislature, it would have so provided in terms, and would not have left a question so important, and one to which its attention must have been especially drawn by the decision in the case of *Chehalis v. Cory*, to construction. The basic principle underlying the *Cory* case and our former decision in this case is that, where the legislature has granted a general power or a power with limitation, a city, in the exercise of that power, may so conduct itself as to work an estoppel, and the relative rights of the property owner and the city will be fixed and determined by reference to the law as it existed at the time. The purpose of a city to levy an assessment for a sum no greater than the estimated cost was to give some guarantee of the cost and afford the property

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owner an opportunity to protest against the improvement because of its probable cost. As we said in the *Van Der Creek* case,

“Prior to the enactment of this law, the only limitation fixed by general law upon the taxing power of the city in matters of this kind was that they should keep within the range of benefits, the amount of which was too often fixed arbitrarily and without right or reason and, being always determined at the discretion of the board of commissioners, could not, in the absence of a positive or constructive fraud, be reviewed by the courts. Clearly there was a mischief made possible by an existing law, and it was the manifest purpose of the act of 1911 to remedy this and to prevent a recurrence of existing abuses which had at times resulted in confiscation.”

While this was said by the court having in mind the general law and not the law pertaining to third class cities, its reasoning is nevertheless applicable to the case at bar. This is clear when it is considered in connection with the case of *Chehalis v. Cory*, which was in effect a holding that the publication of the estimated cost was in the nature of a contract that was binding upon the city.

We may assume, as a matter of law and practice in all cases of this kind, that the sum estimated is a fair amount to be allowed for the improvement; that it is the limit of power and is binding upon the city. If it is not so, the legal effect of the statute of 1911 is to permit the council of cities of the third class, where improvements have been made under the former law, to assess the cost without reference to the law under which the improvement was made, and thus destroy the right of the individual property owner to protest or to be heard in remonstrance.

“The obvious purpose of the estimate is to advise the property owners of the probable expense of the proposed improvement, that they may protest against it if it exceeds what they are willing to pay for the improvement. It requires no argument to show that, when the actual cost is grossly in excess of the estimated cost, the publication of the estimate is much more prejudicial to the interests of the

property owner than if no estimate whatever had been given. It is actually misleading. If no estimate be given, he could, in response to the published notice, protest against further proceeding until it be furnished, and, if overruled, would not be estopped to enjoin the enterprise or contest the assessment on that ground. But where an estimate is given, he has the right to rely upon it, and the city should be estopped to assert any jurisdiction to exceed the estimate in the actual cost assessed. Since the legislature might have dispensed with any estimate, the failure of the council to make any would doubtless be held an irregularity which might be waived by failure to protest. This is also on the ground of estoppel; but obviously no estoppel against the property owner can be grounded upon his action induced by erroneous information upon which he had the legal right to rely." *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010.

To sustain this proceeding is to say that the property owners have no rights that cannot be destroyed by the legislature. We are willing to grant that the legislature may define any procedure or amend in any way an existing procedure pending the collection of a lawful tax for the cost of an improvement within the limit of the authority possessed by the city, but it does not follow that, by a definition of remedies, the legislature can give a municipality a power that it did not possess when the proceeding was initiated. Where the statute contemplates the formal presentation of protests, remonstrances and the like at certain stages of the proceedings, it is universally held that the property owner who fails to make such objection is precluded from doing so at a later stage when the improvement has been completed and the benefits secured. *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444; *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131, 47 Pac. 236; *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353; Page and Jones, *Taxation by Assessment*, § 1026, where the cases are collected.

It would follow, then, where the property owner has been satisfied with the estimate and has allowed the improvement

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to go without protest, that he would be without opportunity or remedy, for the act of 1911, Laws 1911, pp. 468, 469, §§ 42 and 43 (3 Rem. & Bal. Code, §§ 7892-42, 7892-43), confessedly does not go further than to permit the property owner to object to the existence and amount of benefits. Such opportunity may be postponed without harm to the property owner; but the right to question the power of the council, or as it is sometimes called, jurisdiction, cannot be taken away by a subsequent statute going only to a procedure for the collection of an assessment or reassessment. In other words, the limit of power under the act of 1911 is to make all necessary assessments, reassessments or supplemental assessments within the limit of the sum fixed by the law governing the improvement at its inception. The act does not assume to change the limit which can be assessed for benefits. When it says that the property may be reassessed to the amount of benefits, it means the amount of benefits as defined by the law existing at the time the improvement was made. When read in its entirety, the act assumes only to cover cases where the assessment has failed because of informality or mistake in procedure. Indeed, it seems to exempt all matters pending, and *a fortiori*, those already closed by the final action of the council or by proceeding in court. It says:

"All actions and proceedings, which may be pending in court under existing laws which this act in any way supercedes or repeals, shall proceed without being in any manner affected by the passage of this act. All proceedings commenced by any city or town before the taking effect of this act, relating to the making of any local improvement, shall proceed without being in any manner affected by the passage of this act, except as provided in section 24 of this act." Laws of 1911, ch. 98, p. 480, § 70 (3 Rem. & Bal. Code, § 7892-70).

Nor does our conclusion in any way challenge the many holdings of this court that the legislature may, by a curative act, supply any omission or validate any proceeding, however informal, leading up to the assessment. *Frederick v. Seattle*,

18 Wash. 428, 43 Pac. 364; *Cline v. Seattle*, 13 Wash. 444, 43 Pac. 367; *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393; *Waldron v. Snohomish*, 41 Wash. 566, 83 Pac. 1106. These cases are to be distinguished. The *Frederick* case is a type. The power to make local improvements and levy assessments to pay for the same is, and it was so held in that case, in the legislature. It might have done directly what the city of Seattle had done without the warrant of a statute. It followed, as of course, that the legislature might validate the proceeding and permit an assessment within the limit of benefit. The property owner could not complain. He was only made subject to the admitted power of the legislature and his property was assessed within the limit of benefit. His position was no worse than it would have been had the law been on the statute books at the time the improvement was made.

In the case at bar, there was no invalidity. The city had been granted power to make assessments, but the legislature had put a limitation upon the grant. The council acted in excess of its authority in a certain and measurable degree. There was no authority to assess for more than the estimate at the time the improvement was made, and of course no subsequent legislation could change that limitation after the city and the property owner had acted upon it. Nor can there be any estoppel.

"If the authority of the city to levy and collect the assessment was limited to \$6,000, appellant and its contractor were presumed to have known that fact when they contracted for the improvement, and when appellant attempted to levy the larger assessment. They could not, and did not, rely upon subsequent acts of the respondents, when they entered into the contract, and jurisdiction to make a larger assessment should not be now held to have been conferred upon appellant in the manner urged." *Chehalis v. Cory*, 64 Wash. 367, 116 Pac. 875.

"The case is altogether different from one where, having authority to proceed, irregularities and defects in the subsequent proceedings thereafter occur, which do not have the

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effect to take away or impair any substantial right of a party interested." *Zalesky v. Cedar Rapids*, 118 Iowa 714, 92 N. W. 657.

In *Town of Bellevue v. Peacock*, 89 Ky. 495, 12 S. W. 1042, 25 Am. St. 552, the court, in passing upon a question very like the one here presented, said:

"The statute now in question is not merely remedial in its character. When the contract was made for the improvement of the street no right existed to look to the abutting lot-owner for payment. By the general law he was not liable. The statute alone in such a case creates his liability. If A or B, subsequent to the improvement, purchased lots adjoining it, their property would certainly not be liable for its cost in the absence of a statute so providing; and this is equally true, although the purchase was made with knowledge that the party making the improvement had not been paid. Especially would this be so if the highest judicial authority of the jurisdiction had already held that the property was not liable. It is equally true that a person who owned an abutting lot when the contract for the improvement was made, and yet owns it, may defend against the statute in question. When the contract was entered into the town had no authority, express or implied, to bind his property for the cost of the improvement, and when the statute, by virtue of which relief is now asked, was enacted, there was no pre-existing right as against him, or to look to his property. In short, the Legislature, by this act, has attempted to afford a remedy against a party as to whom no right, legal or equitable, existed. As was said in the case of *Hasbrouck v. City of Milwaukee*, *supra*: 'It (the Legislature) would, of its own mere motion, create an obligation where, by law, none before existed. It would impose a liability against the will and without the consent of the party to be charged. This the Legislature cannot do. It can only act retrospectively for the purpose of furnishing a remedy for or removing an impediment in the way of the enforcement of some pre-existing legal or equitable right or duty, and not for the purpose of creating such right or duty.'

"If legal or equitable rights or obligations have arisen between the parties to a transaction, have grown up out of their previous lawful acts, and exist independently of some

want of formality or irregularity which prevents their enforcement, then the Legislature may provide a remedy, but it cannot provide for the enforcement of a non-existing right."

In other words, the rights and obligations of the parties to this suit are fixed by a lawful act duly exercised. The legislature could not, by any subsequent retroactive act, grant a power to the municipality to go beyond the limit—the estimate—for the legislature itself would not have the power to do so. Legislatures cannot ignore executed obligations or proceedings if lawful, and by retroactive legislation substitute another to the advantage of one of the contracting parties or to the disadvantage of the other.

"So he who was never bound, either legally or equitably, cannot have a demand created against him by mere legislative enactment." Cooley, *Constitutional Limitations* (7th ed.), p. 528.

See, also, *App v. Town of Stockton*, 61 N. J. L. 520, 39 Atl. 921.

Appellant makes earnest contention that, in any event, the reassessment should be sustained to the extent of the interest which had accumulated upon the warrants between the time they were issued and the time the assessment was made.

Under the law as it existed at that time, the limit of the assessment was the amount of the estimate, and we are bound to assume on the record that is submitted, that the assessment was sufficient to cover all lawful demands. It does not appear that there was any appeal from the final assessment. As we have heretofore noticed, the proceeding and ordinance take no account of accumulated interest. It purports only to make an assessment for a sum sufficient to bear the cost of the improvement, upon the theory that such sum is within the limit of general benefits.

We find no error. The judgment is affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and MOUNT, JJ., concur.

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[No. 12243. Department One. April 29, 1915.]

F. M. STANLEY *et al.*, *Respondents*, v. J. P. CLOUGH *et al.*,
Appellants.¹

APPEAL—REVIEW—FINDINGS. Findings upon directly conflicting evidence, where the court heard and saw the witnesses, will not be disturbed on appeal unless against the preponderance of the evidence.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 14, 1914, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

John S. Jurey, for appellants.

James R. Chambers, for respondents.

MOUNT, J.—In June, 1912, the appellant J. P. Clough traded an automobile, then in the possession of the Winton company, to the respondent F. F. Travis, for a contract interest in certain lands. At the time the exchange was made, Mr. Clough executed to Mr. Travis a bill of sale of the automobile, which was described therein as follows:

"The following described personal property now located at Winton Garage, in the city of Seattle, in the county of King and state of Washington, to wit: One Winton automobile subject to a lien or mortgage of four hundred dollars and interest, now held by George A. Miller, of the Winton Automobile Company, which purchaser agrees to pay on delivery of the car."

Thereafter Mr. Travis sold his interest in the car to Mr. F. M. Stanley, and Mr. Stanley thereafter tendered the sum of \$400 to the Winton company and demanded a certain red automobile. The Winton company refused to deliver the

¹Reported in 148 Pac. 11.

automobile upon payment of the money, and this suit was thereupon brought against Mr. and Mrs. Clough for the recovery of the value of the automobile, which was alleged to be \$2,250, less the \$400. The case was tried to the court without a jury. The court made findings of fact, and entered a judgment in favor of the plaintiff for the sum of \$1,850. The defendants have appealed.

At the trial, the respondents claimed that, at the time the trade was made, Mr. Clough represented that he had purchased an automobile from the Winton company, and that this automobile was held by the Winton company until the balance of \$400 was paid thereon; that Mr. Clough exhibited to Mr. Travis a red automobile, demonstrated it to him, and afterwards stated that this was the automobile that he was trading for the land contract. Mr. Clough, on the other hand, denied that he showed or demonstrated the red automobile, but claimed that he was trading a model "K" automobile of the value of \$1,200, while the red car was of the value of \$2,250.

The only question in dispute upon the trial was, whether Mr. Clough traded the red automobile, or the black model "K" automobile. There was direct conflict in the evidence upon this question. The plaintiff and three or four witnesses testified, in substance, that Mr. Clough pointed out the red automobile as his car, saying that there was due thereon \$400 to the Winton company; that when this \$400 was paid, the car would be delivered by the Winton company; and that this particular car was the car which he was trading to Mr. Travis for the land contract. On the other hand, Mr. Clough and other witnesses testified that a black Winton car, model "K," was the car which he was trading, and that he pointed it out and exhibited it to Mr. Travis. We have carefully read the record and are not satisfied that the court erred in its finding to the effect that the red automobile was the one traded to the respondent Travis. This appeal presents simply

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a question of fact. We have many times held, where a question of fact has been passed upon by the trial court, who sees and hears the witnesses and has an opportunity to observe their demeanor, etc., upon the witness stand, that we will not reverse a judgment based thereon unless the evidence preponderates against the findings of the trial court. *Bogle v. Devlin*, 81 Wash. 50, 142 Pac. 433; *Falls City Machinery & Supply Co. v. Goodstein*, 69 Wash. 549, 125 Pac. 786.

There are circumstances in the case which indicate that the model "K" automobile was the one which the appellant intended to trade to the respondents, but he did not describe that car in the bill of sale. Either car answers the description in the bill of sale. We are not satisfied from a careful reading of the record that the trial court erred in finding that the red automobile was the one actually traded to the respondents.

The judgment must therefore be affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ., concur.

[No. 12258. Department Two. April 29, 1915.]

W. M. RIDPATH, *Respondent*, v. LOUIS H. DENEE,
Appellant.¹

FORCIBLE ENTRY AND DETAINER — DEFENSES — PARAMOUNT TITLE. Paramount title and right of possession as a homesteader under the laws of the United States, is not an affirmative defense to an action of forcible entry and detainer under Rem. & Bal. Code, § 811, providing that every person who, in the nighttime or during the absence of the occupant of real property, unlawfully enters thereon or who, after demand, refuses for three days to surrender the same, and defining the occupant as one who, for the five days next preceding, was in the peaceable and undisturbed possession of the property, and § 825 expressly limiting the issues in such action to the questions of forcible entry and detainer and occupancy as defined in the act.

SAME—ENTRY — DEFENSES — RIGHTS OF HOMESTEADERS — FEDERAL STATUTES. Our statutes of forcible entry and detainer, Rem. & Bal. Code, §§ 811, 825, are not in conflict with U. S. Rev. Stat., § 2289, authorizing the head of a family to enter a homestead, since Congress has not prescribed the forum for redressing the wrongs of claimants wrongfully dispossessed, but has left the same to local tribunals.

SAME—DEFENSES—PUBLIC LANDS—LAWFULNESS OF ENCLOSURE. 23 Stat. L. 321, 322, to the effect that all enclosures of any public lands of the United States, made by any person having no claim or color of title made in good faith, are unlawful, does not entitle the defendant in an action of unlawful detainer, to show that the plaintiff had enclosed and was in unlawful possession of the land in question, being government land, and was not a qualified homesteader, where it clearly appears that the enclosure was made and possession taken and maintained for twenty years, by the plaintiff and his predecessors in interest, under claim of right and color of title, having purchased the land at a fair price.

SAME—DEFENSES—POSSESSION OF PLAINTIFF—QUESTION FOR JURY. In an action for unlawful detainer, in which defendant claimed that the plaintiff had leased the land and that the lease had not expired, the question of plaintiff's possession was for the jury, where there was evidence that the lease had been surrendered several months previously and plaintiff had resumed actual possession.

¹Reported in 148 Pac. 15.

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Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered June 22, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action of forcible entry and detainer. Affirmed.

Skuse & Morrill, for appellant.

Turner & Geraghty and *D. W. Henley*, for respondent.

Voorhees & Canfield, amici curiae.

MOUNT, J.—This is an action in forcible detainer. The cause was tried to the court and a jury, and resulted in a verdict and judgment of restitution in favor of the plaintiff. The defendant has appealed.

The principal facts under which the controversy arose are as follows: The plaintiff, for more than 20 years prior to the 9th day of March, 1914, was in the peaceable and quiet possession of 75 acres of land in Spokane county. This land was under cultivation and was enclosed by a substantial fence. In the nighttime on March 9, 1914, the appellant, without permission of the plaintiff, broke the enclosure and entered upon the lands. On the next morning, the plaintiff ordered the defendant to remove therefrom, which the defendant refused to do. Thereafter, on the 27th day of March, the plaintiff notified the appellant in writing to remove from the lands. The defendant also refused to comply with this notice for a period of more than three days, whereupon this action was brought. The complaint alleged substantially these facts.

The defendant, in answer to the complaint, denied the plaintiff's peaceable possession as alleged; admitted that defendant was occupying the lands; that he was notified in writing to remove therefrom, and that he had failed and refused so to do. As an affirmative defense, the defendant alleged, in substance, that the lands in question were unsurveyed, unappropriated public lands of the United States, and a part of the public domain, subject to settlement under the homestead laws of the United States; that, on October

30, 1909, the defendant, in good faith, for the purpose of making a homestead entry thereon and acquiring title thereto, made settlement upon the lands in question, has never abandoned the same, and is residing on the lands in good faith under the homestead laws; that, at the time of making said settlement, he was over 21 years of age, a native born citizen of the United States, not the proprietor of more than 160 acres of land in any state or territory, and had never made entry of public lands under the homestead laws of the United States, and was qualified to make settlement upon and entry of public lands and to acquire title thereto; that, at the time the defendant made settlement and established his residence upon the lands, the plaintiff was not in possession of any part thereof, and claimed no right therein; that the plaintiff is now, wrongfully and unlawfully and without any right so to do, attempting to prevent the defendant from maintaining his residence thereon and acquiring title thereto; that the lands described in the complaint are part of a contiguous body of lands containing 1,200 acres, which has never been surveyed by the government of the United States, and has never been disposed of by the government of the United States, but is unsurveyed and unappropriated government lands belonging to the United States, and open for settlement.

The plaintiff filed a motion to strike this affirmative defense, which motion was granted by the court. The appellant urges that the court erred in striking this affirmative defense, and in refusing to receive evidence of the facts therein stated. The statute, Rem. & Bal. Code, § 811, provides:

“Every person is guilty of a forcible detainer . . . Who in the night-time, or during the absence of the occupant of any real property (unlawfully) enters thereon, and who, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who, for the five days next pre-

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ceding such unlawful entry, was in the peaceable and undisturbed possession of such real property."

Section 825 provides:

"On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to a forcible entry complained of, that he was peaceably in the actual possession at the time of the forcible entry; or in addition to a forcible detainer complained of, that he was entitled to the possession at the time of the forcible detainer."

These statutes are clearly peace statutes, and the issues in a case of this kind are but two: First, was the plaintiff, for five days prior to the entry of the defendant, in the peaceable and actual possession of the land, and second, was the entry of the defendant a forcible entry and an unlawful detainer? The statute makes no provision for the trial of title or the right of possession in such a case. Other remedies are afforded by other statutes to try title or right of possession. This statute does not contemplate that a person, even though he be entitled to possession, may, by force or stealth, obtain possession, and thereby put upon the plaintiff the burden of proving the paramount title or a paramount right of possession. This court, in common with other courts, has frequently so held. *Gore v. Altice*, 33 Wash. 335, 74 Pac. 556; *Chesum v. Campbell*, 42 Wash. 560, 85 Pac. 48; *Meyer v. Beyer*, 43 Wash. 368, 86 Pac. 661; *Dutcher v. Sanders*, 20 Cal. App. 549, 129 Pac. 809.

In *Gore v. Altice*, we said:

"The forcible entry and detainer law has always been recognized, ever since its enactment, as a law in the interest of peace, or to prevent violations of the peace and acts of violence in contentions over the possession of real property. It is a provision for a speedy determination, not of any title to the real estate, or of the right of possession, but of the question of who was in actual possession, and if such actual possession was disturbed; and the only question is, was the occupant in the actual and peaceable possession of the property at the

time the possession was wrested from him? The statute provides that the occupant of real property, within the meaning of the law, is one who, for five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property."

The same, in substance, was held in the other cases cited, *supra*. It follows that the court properly struck the alleged affirmative defense. No case is cited to us which holds that, in a case of forcible detainer, the defendant may prove a paramount title or right of possession as a defense.

It is argued by the appellant that because the statute of the United States, U. S. Rev. Stats., § 2289, authorizes the head of a family and a citizen of the United States to enter a quarter section or less of unappropriated public lands, that therefore the statutes relating to unlawful or forcible detainer are in conflict with the United States statute authorizing the entry of unappropriated government lands, and that the United States statute must prevail over the state statute. It is clear, we think, that there is no conflict between the state statutes and the United States statutes. The United States statutes have made no provision for determining conflicting rights under claim of possession, but the determination of these rights is left to the states to be regulated by state statutes. In *Gauthier v. Morrison*, 232 U. S. 452, it was said:

"Generally speaking, it also is true that it is not a province of the courts to interfere with the Land Department in the administration of the public-land laws, and that they are to be deemed in process of administration until the proceedings for the acquisition of the title terminate in the issuing of a patent. But no interference with that department or usurpation of its functions was here sought or involved. It has not been invested with authority to redress or restrain trespasses upon possessory rights or to restore the possession to lawful claimants when wrongfully dispossessed. Congress has not prescribed the forum and mode in which such wrongs may be restrained and redressed, as doubtless it could, but has pursued the policy of permitting them to be dealt with in the local tribunals according to local modes of procedure. And

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the exercise of this jurisdiction has been not only sanctioned by the appellate courts in many of the public-land states, but also recognized and approved by this court. [Citing authorities]."

The question in this case was, whether the respondent was in the peaceable and quiet possession of the real estate at the time of the forcible entry and unlawful detainer. If he was in the peaceable and quiet possession, then it follows, of course, that the appellant could not, by force or by unlawful entry in the nighttime, dispossess him of that peaceable possession. As stated above, neither could the question of title, or the paramount right of possession, be determined in this action. There is clearly no conflict between the Federal and the state laws upon this question.

The appellant attempted to prove that the respondent was in possession of a large tract of unsurveyed government land unlawfully, and that he was not a qualified homesteader. The court excluded this evidence, and this is alleged as error. This contention is based upon § 1 of the act of February 25, 1885, 23 Stat. L. 321, 322, to the effect that all enclosures of any public lands of the United States, made by any person having no claim or color of title made or acquired in good faith, or made with a view to entry thereof at the proper land office, are declared to be unlawful, and are forbidden and prohibited. As we have seen above, it is plain that the legal right of the parties to the possession of these lands cannot be tried in this action. But if the same could be tried, the appellant did not seek to show, either that the respondent was in possession of this particular tract of land without claim of right or color of title, or in bad faith, for it was apparently conceded that the respondent, or his tenant, was in actual possession of the tract of land in dispute, and that the respondent had purchased the land at a fair price and was in possession thereof claiming to be the owner. In *Cameron v. United States*, 148 U. S. 301, it was said, referring to this statute:

"The law, was, however, never intended to operate upon persons who had taken possession under a *bona fide* claim or color of title; nor was it intended that, in a proceeding to abate a fence erected in good faith, the legal validity of the defendant's title to the land should be put in issue. It is a sufficient defense to such a proceeding to show that the lands enclosed were not public lands of the United States, or that defendant had claim or color of title, made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith, . . ."

And in *Wright v. Mattison*, 18 How. 50, in defining what is color of title, the same court said:

" . . . A claim to property, under a conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title, . . ."

It follows, therefore, that, even though the respondent had enclosed the land claimed to have been enclosed, such enclosure was not necessarily unlawful, because the enclosure is not prohibited where it is under claim of right or color of title. The record in this case conclusively shows that the respondent was holding the land, which was surrounded by fence, under claim of right and color of title, and he and his predecessors had so held it for more than 20 years.

The appellant also claims that the court erred in refusing to direct a verdict in his favor, for the reason that the respondent had leased the land to one James S. Grant, and that the term of the lease had not expired. There was evidence to that effect, but the respondent and other witnesses testified that the lease had been surrendered several months prior to the unlawful entry by the appellant, and that the respondent, at the time of the unlawful entry, was in the actual possession of the land. This made a question for the jury. The court instructed the jury that, if they found that Mr. Grant was occupying the premises under a written lease, then the

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respondent could not maintain the action. Upon this question of fact, the jury found for the respondent. It must be concluded, therefore, that the respondent, and not his tenant, was in the actual occupancy of the land at the time of the unlawful entry.

We find no error in the judgment, and it is therefore affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ., concur.

[No. 12317. Department One. April 29, 1915.]

THOMAS NEILL, *as Administrator, Appellant*, v. GEORGE W. GRINER *et al.*, *Respondents*.¹

LOST INSTRUMENTS—EVIDENCE—SUFFICIENCY. The proof to establish a lost written instrument must be clear and positive.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered January 12, 1914, dismissing an action for equitable relief, tried to the court. Affirmed.

Neill & Burgunder, for appellant.

J. T. Brown, for respondents.

PARKER, J.—This is a suit in equity to establish the lien of an alleged lost, unrecorded mortgage upon land of the defendants in Whitman county. Trial in the superior court resulted in denial of the relief prayed for, and judgment of dismissal accordingly. From this disposition of the cause, the plaintiff has appealed.

No question is presented here which we regard as worthy of serious consideration, other than questions of fact as to the existence of the alleged mortgage and its terms and conditions. Manifestly it was the want of sufficient evidence upon these questions to warrant granting the relief prayed for that

¹Reported in 147 Pac. 1137.

induced the trial court to render judgment adverse to the plaintiff. We have carefully read all of the evidence in the record, doing so from the statement of facts rather than from the abstracts. We cannot say that the conclusion of the learned trial judge is not in accord with the evidence; especially in view of the fact that it was practically all oral, involving, more or less, the credibility of witnesses, and the rule requiring clear and positive proof to call for granting relief depending upon the establishment of a lost written instrument. *Scurry v. Seattle*, 56 Wash. 1, 104 Pac. 1129, 134 Am. St. 1092. We think further discussion of the cause unnecessary.

The judgment denying the relief prayed for is affirmed.

MORRIS, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ.,
concur.

[No. 12347. Department One. April 29, 1915.]

F. E. THOMPSON *et al.*, Respondents, v. GEO. W. JACKSON,
Administrator etc., Appellant.¹

EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—CARE OF DECEASED—EVIDENCE—SUFFICIENCY. A claim against an estate for board, expenses and services rendered to the deceased in a filial relation, is substantiated, and the verdict of a jury thereon will be sustained, where it appears that the deceased was old, ill, and helpless, that he had been in the habit of staying with strangers and paying for his board, until his condition required much attention and the person keeping him refused to longer do so, and sent for claimants to take and care for him; that the services were performed, a partial liability admitted, and none of the other children had taken any care of the deceased.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered May 29, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for services rendered. Affirmed.

¹Reported in 148 Pac. 5.

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R. M. Sturdevant, for appellant.

Leon B. Kenworthy, for respondents.

HOLCOMB, J.—Respondents sued to recover, on a first cause of action, for board and lodging, moneys paid for traveling expenses and for laundry, for Frank Thompson, deceased (who was the father of F. E. Thompson), alleged to have been furnished at the special instance and request of deceased, in the sum of \$606.65, and interest; and upon a second cause of action, for services in nursing said deceased by respondent Geneva May Thompson, amounting to \$1,300 and interest. The claims had been presented to the administrator, and the first claim was allowed for \$250 and rejected as to the balance, and the claim for nursing rejected *in toto*. Issues being joined, the case was tried to the court and a jury, and the jury awarded the sum of \$650, with interest from the date of the death of Frank Thompson.

The principal contentions of appellant are, (1) that no agreement was shown whereby the decedent agreed to pay for the board, lodging and services; and (2) that, during the time alleged, the deceased was residing with, and as a member of, the family of respondents.

The evidence is meager as to any agreement, but there was some evidence, by a stranger to the transaction, of an admission by Frank Thompson before his decease to the effect that he expected to pay respondents for his maintenance. There is also evidence to show that he was old, feeble, and, at times, very ill and helpless; that he required some special care all the time after going to respondents' house; that he had been in the habit of staying with strangers and paying for his board and lodging, but that he had gotten so that he could not control the movements of his bowels and bladder, and the person with whom he had been boarding and lodging refused to keep him, and caused the respondents to be sent for to take and care for him. The record shows that he had other children, none of whom took him to care for.

The jury found the facts on somewhat conflicting evidence, and in view of the further fact that appellant admitted a liability to the extent of \$250, we do not feel impelled to examine and weigh the authorities on filial duties and voluntary services. The recovery is sustained by: *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352; *Key v. Harris*, 116 Tenn. 161, 92 S. W. 235, 8 Am. & Eng. Ann. Cas. 200.

The judgment is affirmed.

MORRIS, C. J., PARKER, CHADWICK, and MOUNT, JJ., concur.

[No. 12384. Department One. April 29, 1915.]

J. E. RANDOLPH, *Appellant*, v. EDWARD H. TOGUS *et al.*,
Respondents.¹

SALES—RESCISSION—FRAUD. Misrepresentations as to the value and present condition of a going business, inducing a purchase by one who is unfamiliar with the facts warrants a rescission.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 11, 1914, upon granting a nonsuit, dismissing an action for rescission. Reversed.

Geo. F. Cowan, Jr. and *Richard B. Harris*, for appellant.

CHADWICK, J.—The facts in this case bring it within the rule announced in *Blum v. Smith*, 66 Wash. 192, 119 Pac. 183, and *Bunck v. McAulay*, 84 Wash. 473, 147 Pac. 33, and *Gillette v. Anderson*, ante p. 81, 147 Pac. 634.

Misrepresentation as to the value and present condition of a going business, inducing a purchase by one who is unfamiliar with the actual facts, is sufficient to warrant a rescission on the part of the purchaser.

The judgment of the court below is reversed and remanded for further proceedings.

MORRIS, C. J., PARKER, MOUNT, and HOLCOMB, JJ., concur.

¹Reported in 148 Pac. 5.

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Opinion Per MOUNT, J.

[No. 12391. Department One. April 29, 1915.]

N. W. QUARRING, *Appellant*, v. O. H. STRATTON *et al.*,
Respondents.¹

APPEAL—RECORD—NECESSITY—GRANT OF NEW TRIAL. Where a motion for a new trial, made on all the statutory grounds, was granted, and the record only shows the proceedings after verdict, the order must be affirmed on appeal, since the order may have been granted on other grounds which cannot be reviewed on the record brought up.

TRIAL—VERDICT—MISTAKE—CORRECTION—NEW TRIAL. Where the jury returned a verdict for the defendant by mistake, and was discharged and allowed to separate, the court is without power to call the jury together to correct its mistake and render a verdict for the plaintiff; the remedy being to grant a new trial.

Appeal from an order of the superior court for Whitman county, McCroskey, J., entered April 1, 1914, vacating a verdict and granting a new trial. Affirmed.

J. P. Perkins, for appellant.

Cornelius & Hooper, for respondents.

MOUNT, J.—This appeal is from an order granting a new trial. The appellant has not seen fit to bring the whole record here, but brings only the record of the proceedings after the verdict of the jury.

It appears that, on the 11th day of February, 1914, the jury returned a verdict in favor of the defendants and against the plaintiff in the sum of \$1,200. This verdict was handed to the clerk, who read the same. Thereupon the court asked the jury if this was their verdict, and they assented thereto. The jury was then discharged. On the same day, and a little later, the foreman of the jury informed the judge that the jury had made a mistake in the verdict; that they meant to find a verdict in favor of the plaintiff instead of the defendant. The court thereupon summoned counsel, who had left the court room, and directed the jury back into the box, and

¹Reported in 148 Pac. 26.

upon being informed that the jury had made a mistake in the verdict which had been returned and filed, directed them to retire and consider their verdict further. Thereupon the jury retired and returned a verdict in favor of the plaintiff in the sum of \$1,200. The jury was thereupon polled, and answered that this was their verdict, and this verdict was filed. Thereafter the defendants moved the court for judgment in accordance with the first verdict returned, and in the alternative for a new trial, upon all the statutory grounds. Affidavits were filed by all of the jurors, who stated, in substance, that they had made a mistake in the first verdict, and that the second verdict was the verdict which they intended to return. The court denied the defendants' motion for judgment upon the first verdict, but granted the motion for a new trial, by a general order to that effect. The plaintiff has appealed from the order granting a new trial.

It is possible that the court granted the motion for a new trial for errors occurring during the trial, or for insufficient evidence to justify the verdict, or for some other ground stated in the motion, which involved discretion on the part of the trial judge. The record not being before us upon these questions, we cannot review the same. The order for a new trial must be affirmed upon that ground if upon no other.

The point made by the appellant upon the appeal is that the trial judge should have denied the motion for a new trial and entered judgment upon the verdict in favor of the plaintiff. We are of the opinion that the court did not err in granting the new trial upon that ground. The statute provides, Rem. & Bal. Code, § 361:

"When the verdict is given, and is such as the court may receive, and if no juror disagree or the jury be not again sent out, the clerk shall file the verdict. The verdict is then complete, and the jury shall be discharged from the case. . . ."

The jury, after the verdict was received and filed by the clerk, was discharged from the case. We have no doubt that,

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prior to the discharge of the jury, the court may permit the jury to correct any error in the verdict. But after the discharge of the jury, it was without the power of the jury or the judge to correct the verdict. The remedy then was to grant a new trial. In *Coughlin v. Weeks*, 75 Wash. 568, 135 Pac. 649, the jury had not been discharged. They had been allowed to agree upon a verdict and separate until the verdict was returned into court. What was said by us in that case has no application to the case now in hand, because in this case the jury had been discharged. Their duties were then at an end.

In *Walters v. Junkins*, 16 Serg. & R. (Pa.) 414, 16 Am. Dec. 585, the court said:

"The law allows the jury all reasonable opportunity before their verdict is put on *record*, and they are *discharged*, to discover and declare the truth according to the judgment. The court may also, of their own accord, send the jury back to reconsider their verdict, if it appears to be a mistaken one, and before it is received and recorded. In 7 Bac. Ab., page 9, it is laid down to the same effect; so, also, 1 Inst. 227, and P. Wms. 221. Although these cases do not expressly determine the point, the inference is irresistible that where the verdict is received, recorded, and the jury dismissed, as here, they have not the power to alter their verdict."

In *Reitenbaugh v. Ludwick*, 31 Pa. St. 131, the court said upon this question:

"The cases cited of *McConnel v. Linton*, 4 Watts 357, *Wolfran v. Eyster*, 7 Watts 39, *Walters v. Junkins*, 16 S. & R. 415, were abundant authority for the course pursued, in regard to a correction of the verdict. The jury having sealed it up, and separated on coming into court, it was found not to be in form to meet the whole case, and before receiving and recording it, the court sent them back to put it in due form. This is fully sustained by the cases, and, it is believed, is the universal practice throughout the state. The sealed paper was in fact not the verdict, until it was recorded, and until that was done, it was within the discretion of the court to send the jury back to consider and correct mistakes, or put it in form. A verdict once recorded, and the jury dismissed,

if but for an instant, they cannot be recalled: *Walters v. Jenkins*, 16 S. & R. 415. It is beyond the reach of any discretion, and to exercise it, would be an error reviewable here, which is not so, ordinarily, in cases like the present."

In *Little v. Larrabee*, 2 Greenl. (Me.) 37, 11 Am. Dec. 43, it was held that, where a mistake has been made by the jury in rendering a verdict and the jury discharged, the proper remedy is to set aside the verdict and grant a new trial. This appears to be the generally accepted rule in a case where the verdict of the jury has been received and filed with the clerk, or recorded and the jury discharged.

We are satisfied, therefore, that the order must be affirmed, upon the point relied upon by the appellant. It is so ordered.

MORRIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ.,
concur.

[No. 12405. Department One. April 29, 1915.]

BRIDGEPORT MILLING COMPANY, *Respondent*, v. COLUMBIA
& OKANOGAN STEAMBOAT COMPANY, *Appellant*.¹

APPEAL—REVIEW—PRESUMPTIONS—AMENDMENTS TO CONFORM TO PROOF. A complaint in an action on contract for the transportation of wheat in the fall of 1911, will, if necessary, be deemed amended on appeal to conform to the proof, admitted without objection, of a subsequent modification of the contract as construed and agreed to by the parties, for the transportation of the wheat in the spring of 1912.

CARRIERS—CONTRACTS—BREACH—DELAY—DAMAGES—DEFENSES. Liability for damages for unreasonable delay by a steamboat company in transporting wheat down the river pursuant to its contract with plaintiff, whereby plaintiff lost an advantageous sale of the wheat to a milling company, cannot be avoided by the steamboat company on the claim that plaintiff's contract with the milling company was an absolute sale at the point up the river where the wheat was located, where in fact the sale was dependent on the transportation of the wheat, and was rescinded by the milling company for failure to transport and deliver the wheat.

¹Reported in 148 Pac. 6.

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Opinion Per PARKER, J.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered May 16, 1914, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Reeves, Crollard & Reeves, for appellant.

Thomas & Hannan, for respondent.

PARKER, J.—The plaintiff seeks recovery of damages claimed to have resulted from unreasonable delay on the part of the defendant in receiving and transporting a quantity of wheat which it was under obligation to transport for the plaintiff. The cause was tried by the court without a jury, resulting in findings and judgment against the defendant, from which it has appealed.

Respondent is engaged in buying and selling grain and manufacturing the same into flour and other products, with its principal place of business at Bridgeport, on the Columbia river, situated about 100 miles above Wenatchee. Appellant is engaged in the transportation business, operating a number of steamboats on the Columbia river between Wenatchee and Bridgeport.

In September, 1911, respondent established a wheat buying station at Alameda, on the Columbia river, some thirty-five miles above Bridgeport. The Columbia river is not safely navigable at all seasons of the year between Bridgeport and Alameda, being navigable during two or three months in the fall and two or three months in the spring of the year. Soon after respondent established its purchasing station at Alameda, it purchased, and had on hand in the fall of 1911, about 20,000 bushels of wheat ready for shipment down the river. Before it established this buying station at Alameda, appellant agreed with respondent that it would receive such wheat as respondent should buy at Alameda and transport the same down the river to Wenatchee or intervening points during the fall of 1911. There were not, during that fall nor during the year 1912, any other facilities for the shipping of

wheat from Alameda. The agreement on the part of appellant to receive and transport such wheat as respondent should purchase at Alameda, made prior to the establishing of respondent's purchasing agency there, was the principal inducement prompting respondent to establishing such purchasing agency; for, without a dependable agreement which respondent could look to for the transportation of such wheat as it should buy at that point, it would be wholly impractical, from the standpoint of profits, to maintain a purchasing agency at that place, there being no established transportation facilities therefrom.

During the fall of 1911, appellant transported about 5,000 bushels of wheat for respondent, to this extent complying with the agreement. Whether respondent made demand upon appellant for the transporting of the balance of the wheat during that fall is one of the disputed questions of fact in this case. However that may be, no more wheat was transported during that year. There is evidence warranting the conclusion that it was, in any event, then understood that the balance of the wheat should be transported down the river during the navigable season in the spring of 1912. A considerable amount of correspondence passed between appellant and respondent in the early spring of 1912 which evidences an understanding between them that appellant was considered as being under obligation to respondent to transport the balance of the wheat during that spring. Repeated demands made by respondent upon appellant to that end did not result in the wheat being transported during that spring, and it was not transported until the fall of 1912. In the spring of 1912, while demands were being made upon appellant to transport the wheat, it was informed of a contract for a sale of the wheat being made between respondent and the Wenatchee Milling Company at one dollar a bushel, less coast freight rates. Failure to transport the wheat resulted in failure of consummation of this contract, and consequent loss to respondent by reason of subsequent depreciation of

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the market value of the wheat. The evidence also warrants the conclusion that the price agreed upon between respondent and the Wenatchee Milling Company was in fact the market price at that time. When the wheat was finally transported to market in the fall of 1912 by appellant, the market price had materially depreciated. This was the cause of respondent's damage. As to the amount of respondent's damage, if it is entitled to recover any, there seems to be no serious controversy upon this appeal. The trial court found, among other facts,

"That defendant's equipment for the transportation of freight was such that it could, with reasonable diligence, have received said wheat and transported the same from said Alameda in the year 1912, and before high water in the Columbia river that spring and summer, but it was negligent therein and its failure to transport said wheat was due to negligence of defendant."

The only questions here presented which we regard as calling for our serious consideration are questions of fact.

Counsel for appellant contend that the original contract for the transportation of the wheat in the fall of 1911 was abrogated by mutual consent in the fall of that year, and that there was no certain agreement as to appellant's further duty to transport the wheat in the spring of 1912. A review of the evidence convinces us, however, that the trial court reached a correct conclusion upon this question.

Contention is also made that the contract, in any event, was void in that it impaired the ability of appellant as a common carrier to fulfill its duty to the public as such. This, also, in its final analysis, is only a question of fact, as to which we think the evidence preponderates in favor of respondent.

Some contention is made which seems to rest upon the theory of variance between the proof and the allegations of the complaint. It is true that the allegations of the complaint seem to rest upon the theory that the contract sued upon was

that made in the fall of 1911, before the establishment of respondent's purchasing agency at Alameda. However, the evidence touching appellant's continued obligation under that contract, as construed and understood by the parties in the spring of 1912, appears to have been received without objection. It is also to be noted that damages are claimed in the complaint for failure to transport the balance of the wheat in the spring of 1912. We think, upon the whole record, we should regard the complaint as amended to fit this proof, if indeed any such amendment is necessary.

Some contention is made rested upon the theory that the agreement between respondent and the Wenatchee Milling Company was in fact a sale of the wheat, passing the title thereof at Alameda, and that, therefore, respondent had an enforceable right against the Wenatchee Milling Company for the purchase price of the wheat, which was, in any event, unaffected by appellant's failure to transport the same down the river. We do not construe the contract between respondent and the Wenatchee Milling Company as an absolute consummated sale. The evidence as a whole convinces us that the sale to the Wenatchee Milling Company in the spring of 1912 was understood to be dependent for its consummation upon the transportation of the wheat down the river by appellant under its agreement with respondent, and was subject to rescission for failure of transportation during the navigable season in the spring of 1912, the Wenatchee Milling Company having rescinded the contract because of failure of transportation during that spring.

The judgment is affirmed.

MORRIS, C. J., HOLCOMB, MOUNT, and CHADWICK, JJ., concur.

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Opinion Per MOUNT, J.

[No. 12408. Department One. April 29, 1915.]

MARJORIE GIFFORD, *Respondent*, v. WASHINGTON WATER
POWER COMPANY, *Appellant*.¹

DAMAGES—PERSONAL INJURIES—FUTURE SUFFERING. Evidence of physicians to the effect that an injury causing a depression in the skull of a young child would probably in the future cause epilepsy, paralysis, convulsions or pains and nervousness is inadmissible as a speculative conclusion as to possible consequences, rather than evidence of consequences reasonably certain to ensue from the injury.

STREET RAILROADS—INJURIES—COLLISIONS—NEGLIGENCE—SPEED LIMIT—ISSUES AND INSTRUCTIONS. In an action for personal injuries sustained in a collision between an automobile and a street car, alleged by plaintiff to have been exceeding the city speed limit, in which there was a conflict in the evidence on that point, but no evidence of any unusual conditions, and the facts tended to show that the motorman had a clear right of way and was authorized to run within the speed limit fixed, it is error to instruct that the railway company was guilty of negligence, although not exceeding the limit, if the street car was running at a greater speed than an ordinarily careful person would have operated it under the circumstances and conditions.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered June 11, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a collision between an automobile and a street car. Reversed.

Post, Avery & Higgins, for appellant.

Plummer & Lavin, for respondent.

MOUNT, J.—The plaintiff, a female child of the age of about three years, was riding in the rear seat of an automobile driven by one George E. Bartoo, going east along York avenue, in the city of Spokane. York avenue runs east and west and crosses Monroe street, which runs north and south, in a residential portion of Spokane. When the automobile

¹Reported in 148 Pac. 11.

came to Monroe street, Bartoo, thinking that he could not cross ahead of the street car, which was traveling south on Monroe street, turned north on the left-hand side of Monroe street, and collided with the street car of the defendant. The right front wheel of the automobile struck the right front corner of the street car. The child was injured, and later brought this action, by guardian *ad litem*, to recover for the injury. The case was tried to the court and a jury, and resulted in a judgment for \$2,000. The defendant has appealed.

The complaint alleges:

"That said car was being negligently run and operated at an excessive, dangerous and unlawful rate of speed . . . That the defendant, its agents, servants and employees were further negligent in the operation of said car in failing to control the same and to regulate the speed thereof . . ."

It was conceded at the trial that the rate of speed which street cars in this part of the city might be operated under city ordinances was fifteen miles per hour. When the street car and the automobile collided, the plaintiff was injured about the head and face. At the trial, the plaintiff claimed that the head injury, which appeared to be a depression near a suture of the head back of the right ear, would at some time in the future cause the plaintiff to have epilepsy, paralysis, convulsions, severe periodical pains, and general nervousness. Testimony of two physicians upon this subject was admitted over the objection of the defendant. The court denied the objection, and a motion to strike at the time it was made, saying: "I will overrule the motion for the present." At the close of the evidence, the court denied the defendant's motion to strike the evidence, and the appellant assigns this ruling as error.

Dr. Hoag, a physician called by the plaintiff, testified, among other things, as follows: After describing the depression found on the head of the child:

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"Q. What would that pressure produce there at the present time or sometime in the future, in all reasonable probability? A. Well, there is a probability or possibility of its producing—bringing on epilepsy. The Court: I didn't hear that. A. There is a possibility for its bringing on epilepsy in later life."

Thereafter, on cross-examination, the doctor upon this question testified:

"Q. I notice that you changed the word, when you were asked as to the possibility of troubles arising from depression of the skull at this point, you started in by saying 'probably' and then changed it to 'possibility' of epilepsy; that is correct isn't it? A. Well, I did not intentionally. Q. What? A. I didn't intentionally change it. Q. You meant to say possibility all the time, didn't you; you didn't mean to say probability? A. Well, there is a probability of it and a possibility of it. Q. There is a probability and a possibility? A. I suppose there is. Q. What? A. I suppose so. I think you could class it that way. Q. What is the difference between a probability of epilepsy and a possibility of epilepsy? A. Well, if you would say it was probable you would mean that there would be very little chance that it would not occur, I suppose; and if you would say it was possible, it might occur and might not. That would be my definition of the difference. Q. You say if it was probable there would be but very little chance that it would not occur? A. Yes, if you would say probably there would not be much chance but what it would occur. Q. That is what you mean in this case, is it? A. Well, I would not hardly make it that strong. I would say that you cannot tell whether it will or not. There is a chance that it will and a chance that it wont."

Dr. Nelson testified in behalf of the plaintiff upon this question as follows:

"Q. . . . I want to know what you as a physician, examining this child, assuming there is no lawsuit here, and you were not a witness, you would examine that child and see that head and that scar there, considering the pains that have been testified to, that the child has endured from ear-ache and headache and all that, and just diagnosing the case,

considering the child's head will develop with age, what would you in all reasonable probability expect as the result of that head injury, from the accident, which it now indicates? A. I would probably expect paralysis, convulsions—or convulsions or severe periodical pains in the head and possibly—Q. Leave out the word 'possibly,' doctor. I don't care about that. A. All right. Q. Just what in your opinion you would expect, quite possible? A. General nervousness."

And on cross-examination upon this question, Dr. Nelson testified as follows:

"Q. But when the child gets well and is in apparently perfect health, bright, smart, and a clever little girl four or five years old, a year and a half or two years afterwards, that you know, don't you, that no injury has happened to that brain? A. Yes, sir, I know there is no injury happened to the brain so far. Q. Yes, that is what I thought. And it is not your opinion, is it, doctor, that there ever will be any injury to the brain? A. Well, there possibly may be. Q. Yes, but you, as a doctor, would not say to this jury that is your opinion that there ever will be an injury to the brain? A. Well, I could not say that in my opinion that there would not be, either."

It is apparent from the whole testimony of the doctors that neither of them intended to say that any serious results were reasonably certain to appear from this head injury. The rule is well settled by numerous decisions that future consequences which may presently be recovered for must be such consequences as are reasonably certain to ensue. The rule is well stated in *Strohm v. New York, L. E. & W. R. R. Co.*, 96 N. Y. 305, where the court says:

"Future consequences which are reasonably to be expected to follow an injury, may be given in evidence for the purpose of enhancing the damages to be awarded. But to entitle such apprehended consequences to be considered by the jury, they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative or merely possible, are not proper to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more

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serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff to recover present damages, for apprehended future consequences, there must be such a degree of probability of their occurring, as amounts to a reasonable certainty that they will result from the original injury."

See, also, *L'Herauld v. Minneapolis*, 69 Minn. 261, 72 N. W. 73; *Tozer v. New York Cent. & H. R. R. Co.*, 105 N. Y. 617, 11 N. E. 369; *Briggs v. New York Cent. & H. R. R. Co.*, 177 N. Y. 59, 69 N. E. 223, 101 Am. St. 718; *Galveston, H. & S. A. R. Co. v. Powers*, 101 Tex. 161, 105 S. W. 491; *Brininstool v. Michigan United Rys. Co.*, 157 Mich. 172, 121 N. W. 728; *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978.

We are satisfied that this is the correct rule. And also that the conclusions of these two physicians were clearly speculative and had reference only to possible consequences, and not to consequences that are reasonably certain to accrue. We are satisfied, therefore, that the court erred in refusing to strike this evidence from the record, and in permitting it to be considered by the jury.

In the course of the trial the court gave the following instruction:

"If you find by a preponderance of the evidence that at the time and upon the occasion in question the defendant company was guilty of negligence in operating its car at the rate of speed you find from the evidence it was being operated at, in view of all the facts, circumstances and conditions shown by the evidence in the case, whether running in excess of fifteen miles per hour, or not; that is to say, if you find from the evidence that the defendant company, at the time and upon the occasion in question, was operating its car at a greater rate of speed than an ordinarily careful and prudent person would have operated said car, having regard to the safety of life and limb of others in their enjoyment of the same street, under the same circumstances and conditions as shown by the evidence in this case, and that such negligence, if any, on its part, was the proximate cause of the

plaintiff's injuries, if any, as the term 'proximate cause' has been herein defined to you, then your verdict should be for the plaintiff. . . ."

The contention of the respondent was that the car was being operated at an excessive rate of speed. The city ordinances of Spokane permit cars in this vicinity to operate at a speed of 15 miles per hour. This instruction, in effect, tells the jury that they can find for the plaintiff whether the car was running in excess of 15 miles per hour or not if, under the circumstances in evidence, the jury found that the car was not being operated as a careful and prudent person would operate it.

As an abstract proposition of law, this instruction might not be erroneous. But in this case, it was conceded that the rate of speed of street cars in this vicinity was 15 miles per hour. The respondent attempted to show that the street car was running in excess of 15 miles per hour, while the appellant's witnesses estimated that it was running less than 15 miles per hour, and was stopped within its length after being run into by the automobile. The evidence fails to show that there were any unusual conditions at the time and place of this accident. The street car was running south on Monroe street. This is a paved street fifty feet wide between the curbs, and upon it were laid two parallel street car tracks in the middle of the street. There were no persons upon the track or upon the street at that point, and no persons within view of the car, except one person who was driving a horse and buggy some distance ahead of the car. There were two wagons in York avenue to the west of Monroe street, but these wagons were not visible to the approaching street car, and were not traveling toward Monroe street. The automobile in which the plaintiff was injured was traveling east on York avenue toward this crossing. Instead of going straight ahead, or turning to the right in order to avoid the street car, the driver of the automobile, thinking that he could not cross ahead of the street car, and instead of having

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his automobile under control, attempted to turn to the left, in violation of the city ordinance, and by reason thereof ran into the corner of the street car. If there had been persons upon the crossing, the instruction might have been pertinent to the case. But in view of the fact that the motorman upon the street car had apparently a clear way and nothing to obstruct his progress, it is clear, we think, that he was authorized, under these conditions, to run within the limits fixed by the ordinance, without being guilty of negligence. In *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488, we said:

"If the motorman sees a clear track and has no occasion to stop and no reason to anticipate danger to another, it would not be negligence to maintain the usual rate of speed, even over a crossing. But if he sees, or ought to see, persons or vehicles thereon, not able to get out of his way readily, it would certainly be negligence not to have such control of his car as to be able to stop before reaching such crossing. This case is one where there appeared to be no occasion for stopping at that time."

We think that rule is applicable to this case. It was, therefore, error to tell the jury that they might find for the plaintiff if the street car was running within fifteen miles per hour. It was as much the duty of the automobile to keep out of the way of the street car as it was for the street car to keep out of the way of the automobile.

For both these errors, the judgment is reversed and the cause remanded.

MORRIS, C. J., HOLCOMB, PARKER, and CHADWICK, JJ., concur.

[No. 12429. Department Two. April 29, 1915.]

SCANDINAVIAN AMERICAN BANK OF TACOMA, *Respondent*, v.
PIERCE COUNTY *et al.*, *Appellants*.¹

TAXATION—ASSESSMENT—BANK STOCK—DEDUCTIONS—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 9134, providing that bank stock shall be assessed at its full and fair value in money, first deducting therefrom the proportionate part of the assessed value of real estate belonging to the bank, where the assessed value of the capital stock was determined by considering the value of its real estate over and above the amount of a mortgage thereon, the amount to be deducted therefrom is such value of the real estate entering therein, and not the value of the real estate regardless of the mortgage; in view of Const., art. 7, § 1, providing that "all property" not exempt shall be assessed in proportion to its value and Id., § 2, providing for a uniform and equal rate of taxation upon all property; since, otherwise, instead of avoiding double taxation, part of the bank's property would escape taxation.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered June 10, 1914, in favor of the plaintiff, upon sustaining a demurrer to the answer, in an action to enjoin the collection of a tax. Reversed.

Lorenzo Dow, H. G. Fitch, and A. B. Comfort, for appellants.

Williamson, Williamson & Freeman, for respondent.

MAIN, J.—The purpose of this action was to enjoin the collection of an alleged illegal tax, and compel the proper officer to accept the amount tendered in full payment of the tax. The answer to the plaintiff's complaint contained an affirmative defense. To this affirmative defense, a demurrer was interposed and sustained. The defendants refused to plead further, and elected to stand upon the affirmative defense as pleaded. Thereupon the court entered a judgment in favor of the plaintiff, from which the defendants appeal.

¹Reported in 148 Pac. 18.

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The plaintiff is a corporation engaged in the banking business at Tacoma, Washington. During the year 1911, the bank purchased lots 11 and 12, in block 1008, plat of New Tacoma, for the sum of \$200,000. Upon this purchase price, the sum of \$50,000 was paid in cash, and a mortgage which was then upon the property for the sum of \$150,000 was assumed. During the year 1913, the assessor of Pierce county found the full and fair value of the capital stock to be the sum of \$229,977.28, as of the date of March 1st of that year. The assessor found the full and fair value of the real estate above described to be \$200,000. The assessor fixed the assessed value of the capital stock at 50 per cent of its full value, and the assessed value of the real estate at 60 per cent of its full value. This would result in the assessed value of the capital stock being \$114,988.64; and the assessed value of the real estate would be \$120,000. The mortgage upon the real estate, which had been assumed as a part of the purchase price, still existed in the same amount on March 1, 1913. In determining the value of the capital stock, the assessor took into consideration the value of the real estate over and above the mortgage, but not the value of the real estate regardless of the mortgage. From the assessed value of the stock thus arrived at, the assessor deducted the assessed value of the real estate which he had taken into consideration in determining the value of the capital stock of the bank.

The bank claims that the assessor should have deducted, not only the assessed value of the real estate which entered into the value of the stock as fixed by him, but should have deducted the assessed value of the real estate regardless of the mortgage. The appellants claim that, in deducting the real estate owned by the bank from the amount of its capital stock for purposes of taxation, only that real estate value which entered into the value of the stock should be deducted. The question in this case therefore is, When a bank owns real estate upon which there is a mortgage, and the assessor

only considers the value of the real estate over and above the mortgage in fixing the value of the capital stock of the bank, should there be deducted from the value of the capital stock, thus arrived at, not only the assessed value of the real estate which entered into the value thus fixed, but the assessed value of the real estate without regard to the mortgage?

Section 1, of article 7 of the state constitution provides that "all property" not exempt under the laws of the United States, or under the constitution, shall be taxed in proportion to its value. Section 2 of the same article makes it the duty of the legislature to provide for a uniform and equal rate of assessment and taxation upon all property in the state. Rem. & Bal. Code, § 9134, relates to the matter of assessing shares of stock in banks, and provides that,

"All such shares shall be assessed at their full and fair value in money on the first day of March in each year, first deducting therefrom the proportionate part of the assessed value of the real estate belonging to the bank. . . ."

The purpose of this statute was to avoid double taxation. *Dexter Horton Nat. Bank of Seattle v. McKenzie*, 69 Wash. 314, 124 Pac. 915. All real estate is assessed as such, whether owned by a bank or by an individual. If the value of the real estate is taken into consideration in fixing the value of the stock and is not deducted therefrom, it would result in the real estate being assessed once as such, and also as entering into the value of the capital stock. On the other hand, if, owing to the fact that the real estate is encumbered by a mortgage, the assessor only takes into consideration, in fixing the value of the capital stock, the value of the real estate subject to the mortgage, or, in other words, the value of the real estate over and above the amount of the mortgage, then if, in making the deduction provided for by statute, the assessed value of the real estate regardless of the mortgage be deducted, it would result not only in avoiding double taxation, but in exempting a portion of the capital

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stock from taxation. When read in the light of the constitutional provisions mentioned, the statute providing for the deduction of the proportionate part of the assessed value of the real estate belonging to a bank, when fixing the value of the bank's capital stock for purposes of taxation, contemplates that only that portion of the real estate which entered into the value of the capital stock should be deducted. The affirmative defense in the answer, to which the demurrer was sustained, while not specifically and directly alleging that the assessor, in fixing the value of the capital stock of the bank, only took into consideration the value of the real estate subject to or above the mortgage, there are facts alleged from which this is the reasonable inference. And from the argument in the appellants' as well as the respondent's brief, it is apparent that this is the construction that the parties placed upon it. It thus appears that the assessed value of the capital stock was \$114,988.64. The assessed value of the real estate which entered into the assessed value of the stock was \$30,000. The difference between these two sums, or \$84,988.64, is the amount upon which the taxes upon the capital stock should be computed. In *Dexter Horton Nat. Bank of Seattle v. McKenzie*, *supra*, it was said:

"The capital stock of appellant was assessed at \$622,800 without any deduction therefrom on account of real estate owned by it. We conclude that appellant was entitled to have deducted from that assessed valuation the \$120,150 assessed as the value of trust real property here involved, leaving the assessable value of appellant's capital stock at \$502,650; and to have the taxes computed upon its capital stock accordingly. This will result in the payment of taxes upon all of appellant's assessable property, including its capital stock, and avoids double taxation. Neither the law nor the commonly recognized principles of fair dealing demands more than this."

The conclusion we have reached in the present case will result in the payment of taxes upon all of the respondent's as-

sessable property, and avoids the exemption of any portion of that property from taxation.

The judgment will be reversed, and the cause remanded with direction to the superior court to overrule the demurrer to the affirmative defense.

MORRIS, C. J., MOUNT, FULLERTON, and CROW, JJ., concur.

[No. 12474. Department One. April 29, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. ORTON SMITH,
Appellant.¹

MALICIOUS PROSECUTION—CRIMINAL RESPONSIBILITY—REQUISITES OF INFORMATION—CERTAINTY. Under Rem. & Bal. Code, § 2369, making it a felony to maliciously and without probable cause cause the arrest of another for a felony, and making it a misdemeanor to so cause the arrest of another for a misdemeanor, an information charging a malicious prosecution without specifying the charge on which the arrest was made is fatally defective, in that it charges two offenses, if any, in violation of Id., § 2059, and also in that it fails to comply with § 2057, providing that an information must be direct and certain as regards the crime charged.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered June 30, 1914, upon a trial and conviction of a misdemeanor. Reversed.

John Truax, for appellant.

C. G. Jeffers, for respondent.

PARKER, J.—The defendant was charged by information, filed in the superior court for Grant county, as follows:

"That he, the said Orton Smith, in the County of Grant, State of Washington, on or about the 27th day of December, 1913, then and there being did then and there maliciously and without probable cause therefor, file with Ed. G. Bowker, Justice of the Peace for Warden Precinct, Grant County, Washington, a complaint charging one C. M. Whitman,

¹Reported in 148 Pac. 25.

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with the crime of malicious prosecution and did then and there by so doing maliciously and without probable cause therefor, attempt to cause the arrest of him the said C. M. Whitman, he the said C. M. Whitman then and there being innocent of the crime charged in the complaint of the said Orton Smith."

At the conclusion of a trial before the court and a jury, verdict was rendered in words as follows:

"We, the jury in the case of the State of Washington, plaintiff, against Orton Smith, defendant, find the defendant guilty as charged."

Upon this verdict, the trial court adjudged the defendant guilty of a misdemeanor under Rem. & Bal. Code, § 2369 (P. C. 135 § 233), and that he pay a fine of \$250. From this judgment, he has appealed.

The sufficiency of the information was challenged by counsel for appellant by demurrer before trial and by motion in arrest of judgment thereafter, upon grounds, among others, that the facts stated therein do not constitute a crime, and that the information does not substantially conform to the requirements of the statute. Counsel for appellant contend that the trial court erred in its rulings adverse to appellant upon the challenge to the sufficiency of the information so made.

Section 2369 of Rem. & Bal. Code, under which counsel for the state sought conviction, and the trial court adjudged appellant guilty of a misdemeanor, reads as follows:

"Every person who shall, maliciously and without probable cause therefor, cause or attempt to cause another to be arrested or proceeded against for any crime of which he is innocent—

"(1) If such crime be a felony, shall be punished by imprisonment in the state penitentiary for not more than five years; and,

"(2) If such crime be a gross misdemeanor or misdemeanor, shall be guilty of a misdemeanor."

It will be noticed that the information did not inform appellant whether he was charged with the commission of a felony or a misdemeanor, either by informing him of the nature of the malicious charge he was alleged to have made against Whitman, or by any general statement as to whether that charge was for a felony or misdemeanor.

The only argument suggested to meet the contention of appellant's counsel touching the sufficiency of the information which we regard as worthy of serious consideration is that § 2369, above quoted, defines but one crime of two different degrees, the lesser of which is necessarily included within the greater. The theory of the argument seems to be that one cannot commit the greater without at the same time committing the lesser crime defined in this section, as when one commits an assault and battery he also necessarily commits an assault. The fallacy of this argument, however, we think becomes apparent upon a critical reading of this section. It is plain that one becomes guilty of a *felony* when he maliciously and without probable cause charges another with the commission of a felony, and that he becomes guilty of a *misdemeanor* when he maliciously and without probable cause charges another with the commission of a misdemeanor. This, it seems to us, renders it readily apparent that one's guilt under this section must be determined by the nature of the charge he has made against another, which charge must necessarily be of a felony or of a misdemeanor, each having no relation to the other, so far as the question of guilt in the violation of § 2369 is concerned. If this information can be held to charge any offense at all, it charges two offenses, in violation of Rem. & Bal. Code, § 2059 (P. C. 135 § 1023). It is, in any event, in violation of the provisions of Rem. & Bal. Code, § 2057 (P. C. 135 § 1019), providing that an information "must be direct and certain, as it regards . . . the crime charged." Observations made by this court in *State v. Ackles*, 8 Wash. 462,

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36 Pac. 597, and *State v. Roberts*, 22 Wash. 1, 60 Pac. 65, are in harmony with this view.

We conclude that the trial court erred in overruling appellant's demurrer to the information, and also in denying his motion made in arrest of judgment.

The judgment is reversed.

MORRIS, C. J., HOLCOMB, MOUNT, and CHADWICK, JJ., concur.

[No. 12481. Department One. April 29, 1915.]

E. L. BRENAMAN, *Receiver etc.*, Respondent, v.

M. H. WHITEHOUSE *et al.*, Appellants.¹

CORPORATIONS—CAPITAL STOCK—REDUCTION—DIVIDENDS—VALIDITY. A transaction whereby the stock of a corporation was sold and issued for cash, and the entire sum received was disbursed by the corporation as a dividend and paid to shareholders, is prohibited by Rem. & Bal. Code, § 3697, making it unlawful for the trustees to make any dividend except from the net profits, or to divide, withdraw, or pay to stockholders any part of the capital stock or to reduce the same, except in the manner required by the act.

SAME—CAPITAL STOCK—TRUST FUND—REDUCTION—SOLVENCY. The capital stock of a corporation being a trust fund for the payment of its debts, upon the faith of which the law presumes credit is given, a dividend reducing the amount of the capital stock is unlawful regardless of the solvency of the corporation at the time of the transaction.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered May 1, 1914, upon findings in favor of the plaintiff, in an action by a receiver to recover the amount of a dividend received by stockholders of a corporation. Affirmed.

Oscar Cain, for appellants.

Barker & Barker, for respondent.

¹Reported in 148 Pac. 24.

HOLCOMB, J.—During the month of September, 1910, the appellants were stockholders in, and members of the board of trustees of, the McDermid-Salnavé Engraving Company. Prior thereto, the corporation had sold certain of its stock to the Shaw-Borden Company and other persons, which stock had been paid for in cash. It was agreed between the McDermid-Salnavé Company and the various persons above referred to that the McDermid-Salnavé Company might do certain work for them in its line of business, to be paid for, fifty per cent in cash and fifty per cent in the stock of the McDermid-Salnavé Company, which had been issued to them. At the annual meeting of the trustees of the corporation on September 17, 1910, among other proceedings, it was ordered and directed that the corporation sell 105 shares of its capital stock for \$15 per share, and a dividend was declared of the full amount so realized from such sale. The appellants were present at the meeting and participated therein, and neither of them dissented from such action. On September 19 following this meeting, and in accordance with the action of the trustees, 104 or 105 shares of the capital stock of the corporation were sold and issued to one Leonard, for \$1,560. This sum was paid by Leonard to the corporation, and on the same day, the entire sum of \$1,560 so received was disbursed by the corporation as a dividend to the appellants and to F. G. McDermid and other shareholders, in equal amounts of \$520 each. There were other stockholders of the corporation at the time, but they seem not to have been participants in so far as this dividend was concerned. Subsequently the name of the corporation was changed to McDermid Engraving Company. On January 5, 1913, in an action brought by one of these appellants, M. H. Whitehouse, a receiver was duly and regularly appointed for the company, and respondent was appointed and qualified and has ever since acted as such receiver. This action is brought by the receiver, under the order of the court, to recover the amount

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of the dividend of \$1,560, with interest and costs, demand for its repayment having been made and refused.

The appellants considered that that part of the fifty per cent of the stock sold to Shaw-Borden Company and others which was to be paid in stock, represented a net profit upon the work, and that approximately \$1,000 thereof having been earned, the board of directors were justified in treating all of it as having been earned, and declaring a dividend in that amount. The capital stock of the McDermid Engraving Company, both before and after its change of name, was \$5,000, divided into 500 shares of \$10 each. The trial court held the declaration of dividend void, and entered judgment for the respondent.

The action was based on Rem. & Bal. Code, § 3697, which provides as follows:

"It shall not be lawful for the trustees to make any dividend except from the net profits arising from the business of the corporation, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock of the company unless in the manner prescribed in this chapter, or the articles of incorporation or by-laws; and in case of any violation of the provisions of this section, the trustees under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the board of directors at the time, or were not present when the same did happen, shall, in their individual or private capacities, be jointly or severally liable to the corporation, and the creditors thereof in the event of its dissolution, to the full amount so divided, or reduced, or paid out: Provided, that this section shall not be construed to prevent division and distribution of the capital stock of the company, which shall remain after the payment of all its debts upon the dissolution of the corporation or the expiration of its charter."

It is undoubtedly true, as appellants say, that "the purpose of such statutes is to enable inquiring creditors to look to the public record as to the amount of the capital stock of

a corporation, and to extend credit upon the faith that it has not impaired its capital by any unlawful means;" citing Thompson on Corporations, §§ 1146-1147; and *Union Trust Co. v. Amery*, 67 Wash. 1, 120 Pac. 539. But a transaction on the part of a stock company whereby it retires its own stock, adding nothing of permanent value as assets in the place of it, certainly falls within the prohibition of the statute. The effect of the transactions in this stock was that, whereas the stock should have been outstanding and its value in the treasury or in the assets of the company, it was not outstanding, but was in the treasury of the company, and its proceeds were divided among the three stockholders as dividends.

Beginning with *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364, reaffirmed on the second appeal of that case in 38 Wash. 59, 80 Pac. 172, down to *Kom v. Cody Detective Agency*, 76 Wash. 540, 136 Pac. 1155, this court has consistently held, that a corporation in this state cannot traffic in its own stock; that the capital stock of the corporation is a trust fund for the payment of its debts, upon the faith of which the law presumes credit was given, unless other security was taken at the time by the creditor; and that it is immaterial, since the thing which was unlawfully taken reduced the available resources of a now insolvent company, that the company was solvent at the time the transaction occurred. Appellants seem to think that the case of *Northern Bank & Trust Co. v. Day*, 83 Wash. 296, 145 Pac. 182, arrives at a different result. But that was a case where the capital stock of the corporation was increased to represent the net accrued profits to stockholders, and there was no reduction and extinction of any of the capital stock.

Appellants contend that "the evidence in this case shows that there was no time between the declaration of a dividend and the incurring of an indebtedness of any of the creditors represented by this receiver when the assets of the corporation were below \$5,000." As before shown, this is immaterial.

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However, it was shown that it was in debt to one of the appellants in a substantial sum, and that the indebtedness was not paid. In the *Kom* case, *supra*, it was admitted that the company, at the time of the transaction and at the time of the action, was solvent and had no creditors, and urged that, therefore, the statute could have no bearing on the case. This court held to the contrary, saying, per Chadwick, J.:

"The statute contemplates transactions that may arise in faith of the capital stock, and is broad enough to protect future creditors and also stockholders who are not parties to a prohibited contract."

This case is manifestly ruled by a long line of our own decisions. There is nothing therein to distinguish it in order to adopt the rule contended for by appellants. See *Tait v. Pigott*, and *Union Trust Co. v. Amery, supra*; *Jorguson v. Apex Gold Mines Co.*, 74 Wash. 243, 133 Pac. 465, 46 L. R. A. (N. S.) 637; *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389; *Kom v. Cody Detective Agency, supra*, and many other cases therein cited.

There being no other question to determine, the judgment was right, and is affirmed.

MORRIS, C. J., PARKER, MOUNT, and CHADWICK, JJ., concur.

[No. 12486. Department Two. April 29, 1915.]

LAKE GRAVEL COMPANY, *Respondent*, v. WILLIAMS COMPANY,
Appellant.¹

APPEAL—REVIEW—FINDINGS. Under Rem. & Bal. Code, § 1736, requiring a trial *de novo*, on appeal in actions legal or equitable tried to the court, the findings of the trial court are treated with respect, but will be set aside if the supreme court is convinced that they are against the preponderance of the evidence.

Appeal from a judgment of the superior court for King county, Humphries, J., entered June 22, 1914, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Modified.

Burkey, O'Brien & Burkey, for appellant.

Bamford A. Robb, for respondent.

ELLIS, J.—This is an action to recover a balance claimed to be due for sand and gravel furnished on contract by the plaintiff to the defendant for use in the construction of permanent highway "3 B" in King county, between June 16 and December 1, 1913.

The contract is in writing and provides that plaintiff shall deliver to defendant sand and gravel, according to specifications and acceptable to the county engineer, at sixty-two and one-half cents a cubic yard, f. o. b. Auburn, freight charges to be paid by defendant and deducted from the amount due the plaintiff; cost of freight and hauling charges on any material rejected by the engineer to be deducted from amount due plaintiff. The specifications referred to are those contained in the written contract between the defendant and King county for the construction of the road, and provide that the sand should be clean, coarse and sharp, and that both

¹Reported in 148 Pac. 8.

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sand and gravel should be thoroughly washed until free from lime, clay or earthy particles. Though the written contract is for four thousand yards of material, it is admitted that it was orally agreed between the parties that the written contract should apply to all material furnished.

Exclusive of three car loads rejected by the engineer in the cars and not included in the plaintiff's bill, the plaintiff claimed to have delivered to the defendant 9,942.5 yards of sand and gravel of a value of \$6,214.03. Plaintiff admitted that it received from the defendant \$3,200 cash on account, and that defendant was entitled to credit for \$2,190.21 for freight paid by the defendant, leaving a balance of \$823.82, for which plaintiff asked judgment, with interest thereon from December 1, 1913.

The defendant denied that it had received more than 9,039.75 yards of usable material; alleged that 744.5 yards delivered did not comply with the specifications, but contained debris, dirt and clay and could not be used and was left in the bottoms of the cars; that in addition thereto, 160 yards of material was condemned by the engineer, and that in making part of the sand and gravel that was used acceptable to the engineer, the defendant was required to use in connection therewith cement of the value of \$97.40; and that defendant was put to the expense of hauling and handling condemned gravel which with the cost of this cement, amounted to \$223.90. The defendant also set up an affirmative defense and counterclaim to the effect that, by reason of the inferior grade and quality of the material furnished, the defendant was required by the engineer to pick, clean and wash it before use, and was delayed in the construction of the highway by reason of the inferior material shipped, to the defendant's damage in the sum of \$500.

The case was tried to the court without a jury. The court found that the plaintiff furnished the amount of material claimed in its complaint, which at the contract price

amounted to the sum of \$6,214.03; that the material was of good grade, free from debris, dirt or mud and was shipped in clean cars; that defendant should receive credit for the sum of \$223.90 for rejected sand and gravel and for making part of the material furnished acceptable to the county engineer; that there remained due from the defendant to the plaintiff \$599.92, with interest at six per cent from December 1, 1913, for which amount and costs judgment was entered. The defendant appeals.

The several assignments of error are all directed to the single claim that the findings of the court are not supported by a preponderance of evidence. The respondent advances the much worn argument that this court will not disturb the findings of the trial court unless they lack any support in the evidence. It is asserted that this court has so often decided that counsel deems it unnecessary to cite any authority on the question. It is true that, in a few cases, expressions capable of that construction have inadvertently crept into our opinions, but the contrary rule has been expressed so often and so positively, and is so clearly laid down by the statute, Rem. & Bal. Code, § 1736 (P. C. 81 § 1225), that we are at a loss to understand the continued reassertion of this long discarded theory. As we said in *Baker v. Yakima Valley Canal Co.*, 77 Wash. 70, 137 Pac. 342, after citing a number of decisions:

"These decisions clearly recognize the correct rule that findings of the trial court in a case triable *de novo* will be sustained only when supported by a fair preponderance of the evidence. It is our duty in such a case to weigh the evidence. That is what a trial *de novo* means."

And again in *Zizich v. Holman Security Inv. Co.*, 77 Wash. 392, 137 Pac. 1028, 139 Pac. 57, we said:

"The statute, Rem. & Bal. Code, § 1736 (P. C. 81 § 1225), puts the burden upon this court of trying the case *de novo* in actions legal or equitable tried to the court. In the discharge of this duty, we treat the findings of the trial judge

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with great respect; but if, upon an examination of the evidence, we become convinced that a preponderance of the testimony is against the findings of the trial judge, it becomes our duty to make our own view effective."

See, also, *Lewis v. Dean*, 76 Wash. 596, 137 Pac. 341; *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172; *Dougherty v. Soll*, 70 Wash. 407, 126 Pac. 924; *Johns v. Arizona Fire Ins. Co.*, 76 Wash. 349, 136 Pac. 120, 49 L. R. A. (N. S.) 101, and numerous decisions therein cited, where the same rule is negatively stated.

In accordance with our clear duty under the statute as construed by these decisions, we have examined the evidence in this case with much care. We have read not only the abstract and supplemental abstract, but also the statement of facts, which is not voluminous. We find that the respondent, in open court during the trial, admitted that the appellant is entitled to an allowance for 160 yards of condemned gravel, which at the contract price would amount to \$100; fifteen yards on account of a fir stump shipped in one car, which at the contract price would amount to \$9.37; and for \$97.40 for cement used by direction of the engineer in making other material shipped acceptable. The appellant is thus entitled to an undisputed credit of \$206.77.

There was also undisputed evidence that the appellant, by reason of the shipment of unusable material, was put to the following items of necessary expense:

Demurrage on one car of material.....	\$2.00
Unloading that car.....	5.30
Unloading another car.....	5.00
Hauling twenty yards of condemned gravel to the roadway	11.00
Removing eighteen yards.....	5.65
Removing 110 yards of condemned gravel.....	24.50
	<hr/>
	\$58.45

These items being clearly established, not only by a preponderance of the evidence, but by undisputed evidence, the appellant should receive credit for that amount.

As to the material which appellant claims was left in the bottoms of the cars because of its being mixed with dirt, debris and mud, there was a direct conflict in the evidence. That of the appellant may be condensed as follows: Of the 299 carloads, 210 were shipped in gondola cars, 80 in flat bottomed cars, and 9 in cars of which the evidence gives no specific description. In the bottom of each of the gondola cars were four pockets, each of which would hold about three-fourths of a yard of material. The testimony of the appellant's president and three other witnesses was to the effect that the pockets in each of these gondola cars were filled with mud, slime and debris, indicating that, after the cars were filled, water had been turned upon them, thus washing the earthy material and debris to the bottom of the cars. The testimony is clear that in practically all of these gondola cars this unusable material was not unloaded but was left in the pockets. The appellant's evidence was also clear to the effect that in the bottom of each of the flat bottomed cars was about one yard of unusable material, which was left when the car was unloaded. According to this testimony, it would appear that there were at least three yards of material thus left in each of the 210 gondola cars, amounting in all to 630 cubic yards, and one yard in each of the 80 flat bottomed cars, making a total of this unusable material of 710 cubic yards. This, at the contract price, would amount to \$443.75. Two of the witnesses for the respondent testified that the gondola cars were returned with the pockets filled with material, but denied that the material was inferior in any particular to the balance of the car load. They testified, however, that this returned material was taken from the cars and the cars washed out before reloading, a course hardly necessary if this returned material was good.

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It is also urged on the respondent's part that none of this material found in the bottoms of the cars was rejected by the county engineer. The contract, however, did not make the engineer the arbiter between these parties. The undisputed evidence is that the county inspector on the work did examine many of these cars after they were unloaded, and directed the appellant's employees to reject all such material as found in the bottoms of the cars which he examined. We think that the evidence clearly preponderates in favor of the appellant's claim that the material left in the bottoms of these cars was unfit for use upon the work, did not come up to the specifications that the material should be thoroughly washed until free from lime, clay or earthy particles, and that it was rejected at the instance of the inspector for the county for that reason.

When the respondent presented its bill for the balance of \$823.82, the appellant presented to the respondent a counter bill for credits, including all of the foregoing items, and some others not clearly established by the evidence. In addition to these, the appellant's evidence also tended to establish a claim of about \$60 paid for labor in picking shale from the material which was actually used, and \$45 for loss of time by the bricklayers, caused by the fact that certain of the sand shipped for use as a cushion for the brick was unfit and the bricklayers could not proceed until other sand had been procured. The evidence touching these items, however, is not entirely satisfactory, and in view of the fact that neither of them was included in the bill for credits presented by the appellant to the respondent, we are of the opinion that they should not be allowed. It would seem that, had the appellant believed at the start that it was justly entitled to these credits, they would have been included in its bill. The fact that they were not so included raises a strong presumption that they are an afterthought.

A further discussion of the evidence would be of no profit. It must suffice to say that we have carefully considered all of

it, and are convinced that the evidence clearly preponderates in favor of the conclusion that the appellant is entitled to the following credits:

- | | |
|--|-----------------|
| (1) For the value of 160 yards of rejected gravel;
15 yards for the space occupied by a stump in
one of the cars; and \$97.40 worth of cement,
amounting in all to..... | \$206.77 |
| (2) For demurrage on one car and the handling of
rejected gravel | 53.45 |
| (3) For rejected material left in the bottoms of the
cars, amounting in all to 710 yards..... | 443.75 |
| Total..... | <u>\$703.97</u> |

Deducting this amount from the \$823.82 claimed by the respondent, leaves a balance due of \$119.85, for which amount, with interest from the first day of December, 1913, and costs in the trial court, the respondent is entitled to judgment.

The cause is therefore remanded with direction to the trial court to modify the judgment in accordance with this opinion. The appellant may recover its costs on this appeal.

MORRIS, C. J., MAIN, FULLERTON, and CROW, JJ., concur.

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Opinion Per PARKER, J.

[No. 12491. Department One. April 29, 1915.]

EDWARD EBEN, *Respondent*, v. GEORGE HOUSER *et al.*,
Appellants.¹

APPEAL—DECISIONS APPEALABLE—CESSATION OF CONTROVERSY. AN appeal from a temporary injunction, restraining the disposal of shares of stock pending the action, will be dismissed on the ground of cessation of the controversy, where subsequently the action was dismissed pursuant to a stipulation of the parties who had agreed to submit the matter to arbitration.

Appeal from an order of the superior court for Walla Walla county, Mills, J., entered July 24, 1914, granting injunctive relief pending suit. Appeal dismissed.

Brooks, Bartlett & Neal, for appellants.

John P. Rusk and *Herbert C. Bryson*, for respondent.

PARKER, J.—The plaintiff commenced this action in the superior court for Walla Walla county, seeking recovery of a money judgment against the defendant George Houser, to subject certain shares of stock in the Oregon Black Marble Company to the payment thereof, and to enjoin the disposition of the stock by either of the defendants pending the action. Upon preliminary hearing, the superior court entered an order enjoining both defendants from disposing of the stock pending the action. The defendants have appealed from this injunctive order.

After the appeal was taken and before any judgment was rendered upon the merits in the superior court, a stipulation was entered into between the parties looking to the dismissal of this case and the submission of their differences involved therein to arbitration under Rem. & Bal. Code, §§ 420-430 (P. C. 81 §§ 705-725). In pursuance of this stipulation, the superior court entered an order of dismissal as follows:

¹Reported in 147 Pac. 1159.

"It is considered and ordered by the court that the above entitled cause be and it is hereby dismissed with costs to be taxed in accordance with the stipulation on file herein upon the award of the arbitrators; It is further ordered by the court that the bond for garnishment and the bond for costs furnished by plaintiff at the commencement of this action be and they are hereby released and discharged from all liability herein. And the writ of garnishment herein and the garnishee defendant be and it is hereby dismissed and discharged."

It is not claimed that the court committed error in entering this order. It is not sought to be corrected by appeal or otherwise.

Counsel for respondent now move to dismiss this appeal upon the ground that the controversy, in so far as it is involved in this case, has ceased. We are constrained to grant this motion. It is indeed difficult to see how the superior court could have more effectually put an end to this case. The stipulation looking to submission of the differences between the parties to arbitration may have resulted in a new case coming before the court upon the award of the arbitrators, but that is not a continuation of this case.

Some contention is made touching the sufficiency of the stipulation looking to arbitration, under Rem. & Bal. Code, §§ 420-430. We are not here concerned with the sufficiency of that stipulation as putting an end to this case, or as an initiatory step in a new case. The thing that controls us is the sweeping language of the order of dismissal of this case in the superior court. Whether that order was warranted by the arbitration stipulation or by any other fact before the superior court is of no moment to us. This is not an effort to revise the order of dismissal. It seems quite plain to us that there is not before us any existing controversy growing out of the case in the superior court from which this appeal was taken. We conclude that the appeal must be dismissed. It is so ordered.

MORRIS, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ.,
concur.

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Opinion Per HOLCOMB, J.

[No. 12304. Department One. May 4, 1915.]

J. J. CORNWALL, *Respondent*, v. F. W. ANDERSON *et al.*,
Appellants.

E. P. POLLAND, *Respondent*, v. F. W. ANDERSON *et al.*,
Appellants.¹

APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT—FINDINGS. Upon a trial *de novo* on appeal, it is the duty of the supreme court to carefully examine and weigh the conflicting evidence before the trial court, and to sustain or reverse the findings in accordance with the clear preponderance of the evidence.

BILLS AND NOTES—DURESS—SUFFICIENCY OF EVIDENCE. Duress sufficient to coerce defendants into the execution of promissory notes is not established by evidence that defendants were men in the prime of life, of business experience and mentally competent, that the negotiations were under way for some time after plaintiffs had threatened a receivership and a criminal prosecution, and defendants never sought legal advice, and the notes were not repudiated until about due date, six and one-half months later; the controlling test being the condition of the mind of the wronged party at the time, his state of health, condition in life, experience, education and intelligence.

BILLS AND NOTES—DURESS—WHAT CONSTITUTES. The obtaining of promissory notes by threats of litigation and of criminal prosecution would not constitute legal duress, where the threats were merely of prosecution at some indefinite time, and there was no restraint imminent at the time of signing the notes that could be considered as constraining the mind of an ordinary person.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered April 7, 1914, upon findings in favor of the plaintiffs, in consolidated actions on promissory notes, tried to the court. Affirmed.

Hurn & Hurn, for appellant Anderson.

Graves, Kizer & Graves, for respondents.

HOLCOMB, J.—By stipulation between the parties, the appeals in these two cases have been heard as one appeal.

¹Reported in 148 Pac. 1.

Each of the actions is a suit upon a promissory note in favor of the plaintiff and respondent, signed by W. W. Scott and appellants D. Moylan and F. W. Anderson. The appellants defended separately, being represented by different counsel, but their defense was the same and rested upon the same state of facts. By stipulation the actions were consolidated for trial and tried to the court without a jury. Scott was not made a party to either action. The defense of the appellants was duress. The facts in the cases are these:

Anderson is a man forty-four years of age and, since he was about twenty years old, has been a banker and money loaner. From 1901 to 1914 he lived at Davenport, Washington, and was cashier and the principal stockholder of the Lincoln County State Bank, owning \$38,000 of its \$50,000 capital stock. In 1914, he removed from Davenport to Spokane, where he is engaged in the mortgage and loan business. Appellant Moylan was engaged in the livery business in Davenport for a number of years, and prior to that was a farmer in that vicinity, but removed therefrom to Spokane and is there engaged in the livery business. In 1910, Moylan, together with one Sommers, organized a domestic corporation with a capital stock of one million shares of the par value of one dollar each, naming it the Washington & California Investment Company, in which Anderson and Scott became original subscribers to stock, and the four named composed the original board of trustees of the corporation. Scott was made president and Anderson secretary and treasurer. The stock was nominally subscribed for by Scott, Sommers, and Moylan, and the money required for the company's operations to commence business was raised by a loan made by Anderson.

There is a great mass of testimony in the record as to how Moylan, Scott and Sommers conducted an energetic campaign for the sale of stock among the farmers about Davenport, most of which is immaterial. The plan adopted, however, was that the stock should be sold in blocks of two

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thousand shares, together with ten acres of the company's California lands, for \$2,000 per block, \$500 payable in cash, the remainder in three equal annual installments. Each sale was evidenced by a contract, whereby the company undertook to convey the two thousand shares of stock and a specifically described ten-acre tract of realty upon the making of the payments therein provided. Each of these contracts was referred to as a "share" in the company. Anderson took no active part in the selling. In several instances, intending purchasers went to him for advice as to the advisability of purchasing, and he sometimes gave his opinion as to the prospects of the company. Among the purchasers of "shares" were the respondents Polland and Cornwall, who not only bought several blocks of stock from the company, but also acquired other contracts from other purchasers of the company.

About the latter part of 1912, some dissatisfaction arose among some of the stockholders as to the affairs and management of the company. Scott and a man named Snyder had been placed in charge of the property in California. It was discovered that the land which the company had contracted to sell to the individual stockholders with the stock—that is, the ten-acre tracts, had been sold to other persons who had taken possession of it, and that portions of the land which had been represented as being owned by the company were held only under a contract of purchase and that portions of this had been declared forfeited because of the company's default in payment. Scott's management was criticised, among other reasons, because he was not accounting for all the income realized from the property. Polland and Smith had both gone to California late in 1912, to investigate the condition and affairs of the company for themselves. Returning early in 1913, they went to see Anderson concerning the situation. On February 5, they had a conversation with him in Davenport and, at his request, met him the next day in Spokane, together with Moylan, where an-

other conversation was had, the result of which was that an agreement was made whereby Smith, Cornwall and Polland agreed to sell to Moylan and Anderson sixteen shares of the stock in the corporation for the sum of \$1,170 a share, payment to be made on or before thirty days from date in case a deal then pending on what was called the Reid ranch was closed. In case of failure to close the Reid deal inside of thirty days, the contract was to be null and void. The Reid ranch was a tract of about six thousand acres owned by the company, a sale of which was then pending, and which all persons concerned believed would be consummated and which would net a handsome profit for the company. A sale of the Reid ranch was not closed in thirty days, and the performance of the contract was, by agreement between respondents, Smith, and appellants, extended for another thirty days. Polland and Smith made another trip to California and returned about the 1st of April.

On the 12th of April, the parties again met in Spokane at the Victoria Hotel, and Polland and Smith then insisted that \$500 should be added to the amount which they had theretofore agreed should be paid to them of \$1,170 per share or block, for the time and expense of their second trip to California, which they claimed was because of the fault of Anderson and Moylan. They were in conference at intervals for two days, and the result of the conference was that Anderson and Moylan executed the notes now sued upon on April 14, 1913. The notes, after being signed by Anderson and Moylan, were sent to Scott in California for his signature. Scott signed the notes and returned them on April 22, and thereupon the assignments of the share contracts were made and placed in escrow with Freece & Pettyjohn, a firm of lawyers in Davenport, for delivery when certain conditions had been complied with. The notes fell due November 1, 1913. Anderson did not claim that anything was wrong with the transaction or make any objection to the validity of the notes until October 20, 1913, when he notified

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respondents he did not intend to pay them. Moylan made no effort to invalidate his notes until he made his answer in these cases. He says that, when he made the notes, he intended to pay them.

The answers of the appellants are substantially the same in both cases, and set up the defense of duress by threatening each of the appellants with arrest on prosecution on a false criminal charge unless he executed the notes; and also by unlawful confederation and conspiracy to falsely accuse appellant of a crime and threatening his prosecution and arrest for the purpose of compelling him against his will to buy certain stock owned by respondents in the Washington-California Investment Company, at a price fixed by them which was more than double its real value, and execute the notes sued on therefor; and that, solely by reason thereof, each appellant executed said notes, and that said notes are without consideration.

The evidence to the issue tendered by the appellants was almost wholly of interested parties as witnesses, and is to some extent conflicting. The trial court had the advantage of seeing and hearing the witnesses and judging of their demeanor upon the stand. The trial court found that the appellants executed the notes freely and voluntarily, and that in doing so they were not acting under duress. The respondents insist that we are concluded upon this finding of the trial court, by reason of the fact that this court has so frequently held that the decision of a trial judge based upon conflicting testimony will not be disturbed unless palpably contrary to the weight of the evidence. But it is also true that, in a case tried to the court without a jury, this court is compelled to try the case *de novo*; and as was said in *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172, this court will sustain the findings and judgment of the trial court when, and when only, we can say that we are satisfied that the evidence does not preponderate against the findings. To the same effect see: *Baker v. Yakima Valley Canal Co.*, 77

Wash. 70, 137 Pac. 342; *Zisich v. Holman Security Inv. Co.*, 77 Wash. 392, 137 Pac. 1028, 139 Pac. 57; *Johnsen v. Johnsen*, 78 Wash. 423, 139 Pac. 189; *Mueller v. Vancouver*, 81 Wash. 384, 142 Pac. 868; *Becker v. Clark*, 83 Wash. 37, 145 Pac. 65.

We have felt impelled, therefore, to make a painstaking and careful examination of the evidence in this case in order to ascertain whether or not the evidence clearly preponderates against the trial court's findings. Upon the question of duress as a question of law, the appellants insist that the liberal rule applied by the modern authorities should be applied in this case, to the effect that the real test is "that if one party to a transaction is prevented from exercising his free will by reason of threats made by the other, to the end that he may obtain such contract, the person under restraint may at his option repudiate such contract on the ground of duress. It is the condition of the mind of the wronged party at the time of the acts sought to be avoided that is controlling;" citing *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495; *Callender Savings Bank v. Loos*, 142 Iowa 1, 120 N. W. 317; *Kaus v. Gracey*, 162 Iowa 671, 144 N. W. 625; *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, 32 Am. St. 581, 16 L. R. A. 376; *Price v. Bank of Poynette*, 144 Wis. 190, 128 N. W. 895; *McCarthy v. Taniska*, 84 Conn. 377, 80 Atl. 84; *Nebraska Mut. Bond Assn. v. Klee*, 70 Neb. 383, 97 N. W. 476; *Parmentier v. Pater*, 18 Ore. 121, 9 Pac. 59; *Wilbur v. Blanchard*, 22 Idaho 517, 126 Pac. 1069; *Pickenbrock v. Smith* (Okl.), 143 Pac. 675, and other authorities from Kansas, Massachusetts, Alabama and Missouri.

The appellants contend that the trial court did not apply this test in the broad and liberal spirit now recognized by modern authorities, but that he was obdurate in the idea that the facts alleged by appellants in their answer were not sufficient to constitute duress, and that the case was controlled by *Ingebrigt v. Seattle Taxicab & Transfer Co.*, 78 Wash. 483, 139 Pac. 188. They complain that the learned trial

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judge, in expressing his views in summing up the case, wherein, among other things he said, "I do not think that even if it was proven what defendant claims, any duress would exist in this case," shows that his mind was so imbued with that idea at the outset that the testimony tending to show duress was given scant heed by him. But the trial court showed that he had a very proper conception of the rules to be applied in the case, for in the commencement of his summing up he said: "The evidence in this case does not preponderate in favor of defendants. . . . The rule of law is that the contract or promissory note having been admitted, the presumption is that they are valid and a binding obligation; and to overcome that presumption and to invalidate the note on the ground of duress the evidence should be clear and satisfactory." That view of the trial court was clearly correct. Conceding that the liberal modern doctrine as to the true test of duress sufficient to avoid contracts otherwise valid is as stated by appellants, the rule as it now exists is that the question of duress is one of fact in the particular case, and it may exist whether the threat be sufficient or insufficient to overcome the mind of a man of ordinary courage.

Under the strict common law rule, an act could be avoided for duress *per minas* only when the threatened danger to avoid which it was done was either loss of life, loss of member, mayhem, or imprisonment. Some of the expressions used in the *Ingebrigt* case referred to would seem to indicate that the opinion writer was applying the same strict common law rule; but in any event the test is practically as stated by appellants, with the addition that it is one of fact in the particular case. It would not be proper to simply hold that, merely because a person who has made a contract declares under oath that he was intimidated and acting under fear and duress when the contract was made by him, the contract should by reason of his mere statement be avoided. If that rule were adopted most contracts would be avoided. In con-

sidering the matter of whether there was in fact restraint or coercion, the courts usually consider the state of the mental or physical health, the condition in life, the experience of the person, and his education and intelligence.

Applying some of these tests to the appellant here, under the facts, we find that they are both men in the prime of life; that Anderson, who seems to have been the person principally intimidated, was a man of more than ordinary experience, at least of ordinary intelligence, who had been able to conduct a banking business for a great many years, and who was still mentally and physically competent to conduct a business requiring large intelligence and considerable sagacity, decision and ability. We further find that the negotiations between appellants and respondents commenced on February 5, 1913, and that the contract which resulted on February 6, 1913, gave them thirty days in which to comply therewith, during all of which time appellants had ample opportunity to reflect upon their situation and upon the alleged threats and accusations made against them; that appellants never sought legal counsel; that when the negotiations were resumed on April 12, 1913, they were conducted at intervals for two days; that they separated several times during the negotiations, and that during those times appellants did not seek legal counsel or the counsel of any other disinterested person. They proceeded very deliberately and did much calculating.

There is a conflict in the testimony between appellants and respondents as to just what threats were used. Appellants insist that respondents threatened to prosecute them and Scott and to throw the company into the hands of a receiver. The respondents insist in their testimony that they never at any time threatened to prosecute Moylan and Anderson, but did express the opinion that Scott was guilty of embezzlement or some such offense, did demand a change in the management, and did threaten to bring an action to put the company in the hands of a receiver. Anderson insists that the

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threats that were made to him caused him to fear for his reputation, to fear the disgrace to his wife and children, and to fear for the safety of his bank, and of his affairs generally. It may be fairly questioned, in view of the long time given at the inception of the contract with respondents for reflection by appellants, whether they had any such fears at that time. So far as we can determine, respondents as witnesses were as credible as appellants.

There is considerable suggestion in the record that the affairs of the company in the hands of Scott in California were not properly handled, and there is a suggestion that the sale of the ten-acre tracts which were to be given by the original stockholders of the company to others was known to appellants long before it was known to any of the other stockholders. There is also justification for the belief that the sale of the Reid ranch, together with the other assets of the company, would give the appellants a profit equal to the difference between the amounts which respondents had paid in for their stock and the amounts which appellants agreed to give them for their shares. It is fairly inferable from the facts that the appellants had reason to consider at the time that they were receiving fair value for their notes as well as being rid of troublesome factors in the company.

Nor does the fact that appellants remained silent as to their coercion until a short time before the maturity of the notes justify a very strong inference that appellants had been coerced at the time of the making of the notes. Anderson himself wrote a letter to Scott in California, on April 12, two days before the execution of the notes, referring to the price agreed upon for the sale of the Cornwall, Polland, and Smith shares, in which he stated that Polland, Cornwall, and Smith "said that they will ask for a receiver for the company, and also that they will immediately take out papers against you and give them to Brockman to have you brought into this state to face a criminal charge." He makes no reference whatever in the letter to any threat being made to prose-

cute him (Anderson) or cause him or Moylan to face a criminal charge. Although he states in his evidence that at the time he wrote this letter Polland, Cornwall and Smith were present, the evidence shows he dictated the letter to his stenographer, and neither he nor his stenographer gave any testimony tending to show that the contents of this letter were coerced, although they do say that parts of it were suggested or dictated by Polland. If the affairs of the company were in confusion and the company was being mismanaged, it might be that it would have been perfectly appropriate to have had a receiver appointed for it. A threat of litigation by one who has a legal right to sue is not generally held to be duress within the meaning of the law. *Walla Walla Fire Ins. Co. v. Spencer*, 52 Wash. 369, 100 Pac. 741.

"It is not duress for one who in good faith believes he has been wronged to threaten the wrongdoer with a civil suit; and if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution." *Ingebrigt v. Seattle Taxicab & Transfer Co.*, 78 Wash. 433, 139 Pac. 188.

"Ordinarily, when no proceedings have been commenced, threats of arrest, prosecution, or imprisonment do not constitute legal duress to avoid a contract; the threats must be made under such circumstances that they excite the fear of imminent and immediate imprisonment." *Sulzner v. Cappeau-Lemley & Miller Co.*, 234 Pa. 162, 83 Atl. 103, 39 L. R. A. (N. S.) 421.

In the instant case, none of the evidence, even taking appellants' testimony for it, tended in any way to show that there was any threat of imminent and immediate arrest and imprisonment. The threats at most were of prosecution at some indefinite time in the future. There was no restraint imminent at the time of signing the contract or signing the notes that could be considered as constraining the mind of an ordinary person.

There is an effort made by the appellants to classify the cases upon the question of what constitutes duress *per minas*.

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There is no classification possible or necessary under the authorities. Each authority, so far as we have reviewed them, amounts almost to an authority for that case alone.

After considering all the testimony, we are convinced that the evidence does not preponderate against the findings of the court, and that the judgments should be affirmed.

MORRIS, C. J., PARKER, MOUNT, and CHADWICK, JJ., concur.

[No. 12235. Department Two. May 6, 1915.]

MYRTLE BEACH, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—LIABILITY. In an action for injuries received by driving an automobile into a gulch across one of the city streets, there was sufficient evidence to present the question of the city's negligence to the jury, where it appeared that a gulch thirty feet deep and eighty feet wide crossed such street, but that the lighting of the streets on each side of the gulch gave the impression of a continuous street; that there was no barrier, or danger signal or light near the gulch, except an ordinary incandescent light on a telegraph pole, which tended rather to obscure than disclose the gulch, and in the obscurity the ravine presented the appearance of a continuation of the unpaved portion of the street.

NEGLIGENCE—IMPUTED NEGLIGENCE—DRIVER OF VEHICLE. Contributory negligence of the driver of an automobile in exceeding the speed limit is not imputable to an invited guest, who was not in a position to exercise some control over the driver, had no reason to believe the driver was careless or incompetent, did not appreciate that the speed was dangerous, and was unfamiliar with the streets over which she was riding.

JURY—CHALLENGES—PREJUDICE. Challenge for cause to a juror was properly sustained, on the ground that it would take evidence to remove his initial prejudice, where he admitted on examination that he had a prejudice against young people attending dances, and that the fact that the young people were returning from a social dance would prejudice him against plaintiff who was suing for injuries received while returning from a dance; even if the juror on

¹Reported in 148 Pac. 39.

further examination, stated that, while he was decidedly opposed to dances, if it appeared that plaintiff's injuries in no manner grew out of her having attended a dance, he would not lay that up against her, but would go according to the law and testimony.

JURY—TERM OF SERVICE—EXPIRATION DURING TRIAL—EFFECT. If a jury is properly drawn and impaneled, and enters upon a trial within the regular jury term, it is a properly constituted jury to complete the trial, though it may carry them over their statutory term as jurors; notwithstanding 3 Rem. & Bal. Code, § 94-4, providing jury terms to commence on the first Monday of each month and end on the Saturday preceding the first Monday of the next month unless changed by order of the judge, and notwithstanding that no such order for a change was made.

APPEAL—REVIEW—HARMLESS ERROR—WAIVER. Where, in an action for personal injuries, the court, in withdrawing from the jury the question of damages as to certain injuries not included in the complaint, failed to mention one of the items omitted, the omission was not prejudicial error, where counsel stated that the withdrawal was sufficient and failed to request instruction on the point, and the verdict was not excessive.

MUNICIPAL CORPORATIONS—INJURIES FROM DEFECTIVE STREET—EVIDENCE—SIMILARITY OF CONDITIONS. In an action for injuries received from driving an automobile into a gulch crossing a city street, on account of the unguarded and deceptive condition of the street, evidence as to the condition of the street some eight months after the injury was not error, where the comparative conditions of the street were not materially changed, and on the subsequent date, an auto truck, on a similar dark night, and with a headlight illuminating the roadway for about the same distance as the other machine, was driven over the same course and the gulch was not discovered by the driver until his front wheels went over the edge.

APPEAL AND ERROR—PRESERVATION OF GROUNDS—OBJECTIONS. Testimony of a pedestrian that, to one approaching a gulch in the nighttime, the street had the appearance of a continuous one, cannot be urged on appeal as inadmissible, because the time of witness' observation was not fixed, where no objection was made in the court below.

TRIAL—INSTRUCTIONS—CONSTRUCTION AS WHOLE. Though isolated parts of instructions, standing alone, might be objectionable, it would not constitute error, where, taken in connection with the balance of the instructions in context, they properly state the law.

TRIAL—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN. The refusal of requested instructions is not error, where they are fully covered by the instructions given.

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Opinion Per ELLIS, J.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 7, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in an automobile through the negligent maintenance of a street. Affirmed.

James E. Bradford and Howard M. Findley, for appellant.

Beeler & Sullivan, for respondent.

ELLIS, J.—This is an action for damages resulting from personal injuries to the plaintiff caused by the alleged negligence of the defendant.

Boston street, in the city of Seattle, runs east and west, Queen Anne avenue north and south. The Whittlesey home was located near the intersection of Fourth avenue, north, and Crockett street. Fourth avenue, north, is parallel to and six blocks east of Queen Anne avenue. Crockett street runs in the main parallel to and one block south of Boston street. Crossing Crockett street a little south of its intersection with Third avenue, north, is a gulch or ravine about thirty feet deep and nearly eighty feet wide. On the west side of this ravine, the pavement on Crockett street extends to within five or six feet of the abrupt edge of the ravine. From Queen Anne avenue east to Warren avenue, a distance of two blocks, Crockett street has a considerable up grade. From Warren avenue east almost to the gulch it is considerably down grade. From the gulch east to Fourth avenue, north, the grade again rises. The altitude of Crockett street at its intersection with Warren avenue about two blocks west of the ravine, and at its intersection with Fourth avenue about one and one-half blocks east of the ravine, is about the same, so that going eastward on Crockett street one's vision from Warren avenue naturally strikes a point on Crockett street about Fourth avenue. The ravine, the balance of the street in the block in which it is located being unpaved, gives in the nighttime to an observer coming east on Crockett street the appearance of a continuous street with an intervening un-

paved block, the street lights being continuous on both sides of the ravine.

On the night of the accident, there was no barrier, red light or any danger signal of any kind to indicate the presence of the gulch. There was no light of any kind near the gulch except a street light on a telegraph pole at the northwest corner of Crockett street and Third avenue. This was not an arc light, but an ordinary incandescent lamp. The evidence shows that this light rather obscures than discloses the gulch, as it is of such height that it is directly in one's face as he approaches from the west, so that the gulch is not perceived until after passing the light. Several witnesses who had viewed this situation in the nighttime testified in substance that the contour of the ground and the lighting of the streets on each side of the gulch gives the impression that the street is a continuous street until one is very near the brink of the ravine.

The plaintiff, on the evening of March 30, 1913, as the guest of the Whittlesey family, attended a social dance held at a hall near the intersection of Boston street and Queen Anne avenue, the party going in the Whittlesey automobile. The dance concluded near midnight, and the Whittlesey party, including the plaintiff, started to the Whittlesey home in the automobile, which was driven by a young man of the family. The side curtains and wind shield were up and the lamps were lighted. The automobile proceeded one square south on Queen Anne avenue, then east on Crockett street and up grade to Warren avenue; thence down grade for a distance of two squares, plunging into the ravine, inflicting the injuries of which plaintiff complains.

There is no satisfactory evidence that the automobile was proceeding at a very rapid rate of speed until after it started down grade. From there on the speed was increased, and it was evidently excessive at the time of the plunge. The appellant sat on the front seat with the driver, but the evidence indicates that she had no appreciation of the speed of the

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automobile and that she had no knowledge of the existence of the gulch. She had never been in this part of the city before and was unfamiliar with the streets. She testified that she could see the lights on the other side of the ravine, which she noticed only as a kind of dark spot or shadow in the street, but did not think it indicated any danger. She did not attempt to exercise any control over the automobile or to select the streets over which it was driven. The jury returned a verdict in favor of the plaintiff for \$3,500. From the judgment thereon, the defendant appeals.

We shall spend little time in a discussion of the negligence of the appellant. A careful consideration of the whole record convinces us that the city was grossly negligent in leaving a gulch of this character, with the pavement of the street running to its very brink, without providing a barrier of any kind or any red light or other danger signal to indicate its presence. There was ample evidence to take the case to the jury upon the primary question of appellant's negligence.

The question of respondent's contributory negligence was also one clearly for the jury. She had no control over the automobile, had never driven or operated one and, so far as the record shows, had no reason to believe that the driver was incompetent or careless. The contributory negligence charged is that the automobile was running at an excessive rate of speed. This is probably true, but there is no evidence that the respondent appreciated that the speed was dangerous, and the evidence is positive that, though looking straight ahead, there was nothing to warn her of the existence of the gulch or to lead her to believe that there was any danger. She was merely an invited guest; and even conceding that the driver was running the car at an excessive rate of speed, that fact would not impute negligence to the respondent. The correct rule in such cases is that declared in *Cable v. Spokane & Inland Empire R. Co.*, 50 Wash. 619, 97 Pac. 744, 23 L. R. A. (N. S.) 1224, and quoted with approval in *Wil-*

son v. Puget Sound Elec. R. Co., 52 Wash. 522, 101 Pac. 50, 132 Am. St. 1044, as follows:

"Ordinarily where one rides in a vehicle with the driver thereof and is injured by the negligence of a third person, to which negligence that of the driver contributes, this contributory negligence is not imputable to the passenger, unless said passenger has, or is in a position to have and exercise some control over the driver with reference to the matter wherein he was negligent."

See, also, *Shearer v. Buckley*, 81 Wash. 370, 72 Pac. 76; *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365.

The appellant insists that the court erred (1) in sustaining the challenge to a juror for cause; (2) in not sustaining appellant's motion to discharge the jury as disqualified; (3) in improperly admitting certain evidence; (4) in giving certain instructions and refusing to give certain others.

I. In his examination on his *voir dire*, Louis Benson, who had been called as a juror, answered questions as follows:

"Q. Have you any prejudice against young people attending social dances? A. Yes, sir, I have. Q. And the fact, if it occurred in this case, that these people were returning from a social dance would prejudice you, would it? A. It would."

The respondent interposed a challenge for cause. On further examination and after much explanation by counsel, the juror finally stated, in substance, that while he was decidedly opposed to dances, if it appeared that the fact that respondent was injured in no manner grew out of her having attended a dance he would not lay that up against her, but would "go according to the law and the testimony." Over the appellant's resistance, the court sustained the challenge. We find no error in this. The matter was one resting largely in the discretion of the trial court. From the whole colloquy, as it appears in the record, we are of the opinion that it would have required evidence to remove the initial prejudice which the juror admitted.

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II. The appellant contends that the jury was disqualified, in that, though all the jurors were qualified at the time the jury was impaneled, four of them became disqualified a few days after the trial began, by expiration of their time of service, under the statute (3 Rem. & Bal. Code, § 94-4) providing that jury terms shall commence on the first Monday of each month and end on the Saturday preceding the first Monday of the next month, unless the commencing or ending of the term be changed by order of the judge, and that in this case no such order was made. The four jurors in question were summoned for the jury term commencing on the first Monday of March, 1914. The jury was impaneled on Thursday, April 2, 1914, and the trial commenced on that day. It must have been then evident that the trial would continue over the following Monday. Though the fact of the approaching expiration of their term was developed on the examination of the jurors, no objection was made to their entry upon the trial on that account, nor until Tuesday, April 7th, when counsel for appellant in the midst of the trial moved to "dismiss the case" on the ground that the jury as *then* constituted was not a legal jury. The motion was properly denied. To construe the statute as disqualifying a jury which, prior to the expiration of its term of service, had been impaneled and had entered upon a trial would lead to absurd results. Such a construction would render impossible a jury trial which could not be completed for more than a month, and might render the jury useless during a large part of the jury term if the jury cases pending each required several days for trial. Counsel rely upon our decision in *Jennings v. Puget Sound Traction, Light & Power Co.*, 76 Wash. 15, 185 Pac. 468, but in that case the jurors had served their full term before the jury was impaneled. No properly constituted jury had ever been secured. The distinction from the case here is too plain to require further comment. Of necessity we hold that if a jury is properly drawn and impaneled and enters upon a trial within the jury

term it is a properly constituted jury to complete the trial.

III. The appellant next contends that the court improperly admitted, (a) Evidence of certain physical injuries not mentioned in the claim filed with the city clerk; (b) Evidence of a subsequent accident at the same place to an auto truck; (c) The testimony of a pedestrian as to the appearance of the street at night, the time of his observation not being fixed.

(a) Respondent's claim filed with the city clerk specified with much particularity her external injuries and injuries to her neck and throat, merely describing other injuries as "internal injuries." Two physicians testified as to her condition, stating in substance that, as a result of the injuries, the ovaries were tender, the uterus inflamed, the cervix ulcerated, and that a curettment would be necessary. The respondent testified that, since the injury, her menses have appeared much more often than formerly, at irregular periods, are very painful, and that she experienced that condition for the first time shortly after the accident on March 30, 1918. The claim was filed on April 26th. The appellant objected to all of this testimony, and moved to strike it on the ground that these things were not mentioned in her claim. The objections were overruled and the motion denied. At the close of respondent's evidence, the jury being temporarily excused, the appellant renewed its motion that this evidence be stricken on the ground that both the complaint and the claim were insufficient to cover these injuries. The motion was again denied. Counsel then moved for a continuance on the ground of surprise. After argument the court reversed his former ruling, granted the motion to strike the evidence on the ground that the complaint was insufficient to admit it, and denied the motion for a continuance. The jury was recalled and the court gave the following oral instruction:

"Ladies and gentlemen: It becomes my duty under the allegations of this complaint to withdraw from your consideration any question of damages as to the irregular menstruation of the plaintiff or any injury to the ovaries. So in con-

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sidering the amount of the damages, if you find for the plaintiff, you will omit any damages on those grounds, because the complaint claims no damages on those particular items. So it will not be necessary under that ruling for the defendant to put in evidence touching those particular items. Is that sufficient?

"Mr. Findley: 'Yes.'"

Counsel now urge that this was not sufficient, in that the court failed to mention the uterus. It was the clear intention of the court to withdraw from the jury's consideration all evidence of injury to genital organs. The jurors could hardly have failed to so understand. If counsel was not satisfied on this point he should have indicated the omission when appealed to by the court. He did not do so, but assented to the court's instruction. Nor do we find any merit in the claim of fatal error in that the court did not cover the withdrawal of this evidence in the final written instructions. It is sufficient to say that no such instruction was requested. Moreover, the only possible prejudicial effect of this evidence, had it not been stricken, was its tendency to augment the damages. It is not claimed, and in view of the other injuries clearly established by the evidence it could not be claimed, that the verdict was excessive.

(b) A witness was permitted to testify that, on the night of December 16, 1913, about eight months after the accident in which the respondent was injured, he was driving an auto truck along Crockett street and, when he was approaching the place of the accident, the gulch or ravine looked like a block of unpaved street; that he drove off of the paved street and onto what he supposed was the dirt street and did not perceive his mistake until the front end of the machine went down, throwing the rays of his auto lights onto the bottom of the ravine. The appellant contends that this was fatal error because of the lapse of time and the changed conditions. The purpose of this evidence was to show the dangerous and deceptive condition of the street. Obviously the mere lapse of eight months between the two accidents would be no valid

reason for excluding this evidence if the conditions were not materially changed. A careful consideration of all of the evidence as to the comparative conditions convinces us that there was no material difference. The measurements of the width and depth of the gulch at the time of the accident and at the time of the trial were practically the same. There may have been a slight change in the lighting of the street, though this is not clear from the evidence, but the appellant admits in its brief that the absence, on the night of the last accident, of the light suspended from the telegraph pole, which was there at the time of the respondent's injury, was more favorable to a discovery of the gulch by an approaching driver than was its presence. The headlights on the two machines illuminated the roadway for about the same distance. The evidence indicates that both nights were dark. While the truck driver testified that, at the time of his accident, "it was just drizzling rain a little," we do not consider that circumstance sufficient ground for excluding evidence which was otherwise clearly admissible as descriptive of the condition of the street itself. *Smith v. Seattle*, 38 Wash. 481, 74 Pac. 674; *Blair v. Seattle Elec. Co.*, 67 Wash. 465, 122 Pac. 358, Ann. Cas. 1913 D. 529; *Elster v. Seattle*, 18 Wash. 304, 51 Pac. 394. As said in *District of Columbia v. Armes*, 107 U. S. 519, cited and quoted with approval in *Smith v. Seattle, supra*:

"Persons are not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of inquiry to which attention was called by the nature of the action and pleadings, and the defendant should have been prepared to show its real character in the face of any proof bearing on that subject."

(c) A pedestrian also testified that to one approaching the ravine along Crockett street in the nighttime it had the appearance of a continuous street. The objection now urged, that this testimony was inadmissible because the time of his

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observations was not fixed, is unavailing. So far as the record shows, no such objection was made in the court below.

IV. We shall not discuss in detail the instructions given by the court. We have read them with care and find that they clearly and correctly state the law applicable to the evidence. The appellant's criticisms are directed to isolated parts of the instructions which, if they stood alone, might be objectionable, but taken in context they are not. Nor shall we consume space by a detailed discussion of the instructions requested and refused. In so far as they would have been proper, they are fully covered by the instructions given.

We are convinced that the case was fairly tried and properly submitted to the jury. We find nothing in the record to warrant a reversal. The judgment is affirmed.

MORRIS, C. J., MAIN, FULLERTON, and CROW, JJ., concur.

[No. 12351. Department Two. May 6, 1915.]

HARRISON S. TAFT *et al.*, *Respondents*, v.
WHITNEY COMPANY, *Appellant*.¹

CONTRACTS—BUILDING CONTRACTS—APPROVAL OF ARCHITECT. Where construction work is to be done to the satisfaction of a third party, such as an architect, the judgment of such third party, either in approving or condemning the work, must be exercised in an honest and independent manner, not arbitrarily or fraudulently; and, if the approval or condemnation of the work is arbitrary, it amounts to a constructive fraud.

CONTRACTS—PERFORMANCE—QUESTION FOR JURY. In an action by a subcontractor on a contract for putting in the cement floors of a large office building, whether the architects had been arbitrary in condemning the work and ordering its removal, and whether the work done by the subcontractor was in conformity to the plans and specifications, was a question for the jury, where the evidence showed he had completed the work on five of the floors, and the architects ordered them all out on the objection that they did not conform to sample and that the subcontractor had been employed without his

¹Reported in 148 Pac. 43.

approval, as the contract with the construction company required; and the subcontractor testified that whatever defects there were in the floors could have been corrected without their removal.

CONTRACTS—PERFORMANCE—EVIDENCE. In an action by a subcontractor to recover for work done which the architects condemned and ordered replaced by the principal contractor, evidence touching the question whether the floors constructed by the subcontractor were equally as good as those subsequently constructed by the principal contractor to replace them was admissible as bearing on the question whether the architects had considered the merits of the subcontractor's work when they ordered its removal, or whether the reason they condemned it was because the contract had not been submitted to them for their approval.

Appeal from a judgment of the superior court for King county, Humphries, J., entered May 12, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

John H. Powell and George R. Biddle, for appellant.

Herr, Bayley & Wilson and Carl E. Croson, for respondent Taft.

Turner & Hartge and John W. Roberts, for respondent Maryland Casualty Company.

MAIN, J.—Some time prior to the first day of April, 1913, the owner of certain real estate in Seattle contracted with the Whitney Company, a corporation, for the erection thereon of a building. This building is generally known as the L. C. Smith building. The architects for the building were Gaggin & Gaggin, of Syracuse, New York. The representative of the architects in superintending the construction of the building was one H. W. Thompson. On the date mentioned, the Whitney Company contracted with the plaintiff Harrison S. Taft, that the latter should provide all of the materials and perform all of the work necessary for the "cinder filling and finishing of the cement floors for the L. C. Smith building." These floors were to be constructed "according to the general masonry and carpenter specifications pertaining to this work." The contract between the Whitney Company and

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Taft contained a provision that the work was to be done "under the direction of the said architects, and that their decision as to the true construction and meaning of the drawings and specifications shall be final."

The Maryland Casualty Company wrote the bond guaranteeing the faithful performance of the contract by Taft. The contract between the owner and the Whitney Company contained a provision that "No contractors are to be employed unless the owner and architects have first approved of the persons in writing after contractor has proposed subcontractors in writing to owner and architects. The architects shall have the right to demand the immediate discharge of any incompetent workman or subcontractor by giving the contractor or his foreman a written order or telegram to that effect." The contract of the Whitney Company with Taft was at no time submitted by that company to the architects or the owner in accordance with this provision.

Some time after the contract for the construction of the floors had been entered into, Taft entered upon the performance of the work therein provided for. After Taft had put in about one-half of five floors, the work was condemned by the architects, and he was directed to begin removing the same from the building within twenty-four hours. This he did not do, and on August 11, by written notice from the Whitney Company, the contract was terminated. After Taft's contract had been terminated, the floors were taken out by the Whitney Company. This company then constructed the floors throughout the building.

The present action was instituted by Taft for the purpose of recovering for the work which he had done, and for damages. The bonding company, while not originally a party to the action, became such by stipulation. The answer of the Whitney Company to the plaintiff's complaint contained a counterclaim for damages. The cause was tried to the court and a jury. A verdict was returned in favor of the plaintiff for the value of the work which he had done under

the contract at the time of its termination. Motion for a new trial being made and overruled, a judgment was entered upon the verdict in favor of the plaintiff and against the defendant, the Whitney Company. From this judgment, the latter appeals.

The case presents three questions: First, was the condemnation of Taft's work by the architects binding and conclusive, if in fact the architects acted in an arbitrary manner? Second, If the subcontractor has the right to impeach the acts of the architects which are arbitrary, is there sufficient evidence in this case to carry the question of the arbitrariness of the conduct of the architects to the jury? And third, Did the trial court err in admitting evidence as to the floors put in by the Whitney Company?

I. The Whitney Company claims that, under the terms of the contract which required the work to be done under the direction of the architects, and that their decision as to the true construction and meaning of the drawings and specifications shall be final, the acts of the architects cannot be impeached except for fraud. In support of this contention a number of cases are cited, most, if not all, of which are from the courts of the state of Pennsylvania. Whatever the rule in that state may be, the law in this state is reasonably well settled by the previous decisions of this court. The rule of these decisions is, that where construction work is to be done to the satisfaction of a third party, such as an architect, the judgment of such third party, either in approving or condemning the work, must be exercised in an honest and independent manner and not in an arbitrary or fraudulent manner. If the approval or condemnation of the work is arbitrary, it amounts to a constructive fraud. *McDonald v. Lewis*, 18 Wash. 300, 51 Pac. 387; *Dyer v. Middle Kittitas Irr. Dist.*, 40 Wash. 238, 82 Pac. 301; *Camp v. Neufelder*, 49 Wash. 426, 95 Pac. 640, 22 L. R. A. (N. S.) 376; *Ise v. Aetna Indemnity Co.*, 55 Wash. 487, 104 Pac. 787.

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II. The next question, therefore, is whether the evidence was sufficient to carry the question to the jury as to whether the architects in condemning all of the work put in by Taft, and ordering its removal, acted in an arbitrary manner. The evidence of the plaintiff showed that the floors put in by Taft were equally as good as those subsequently constructed, and were in accordance with the plans and specifications; that the architects' principal objection to the floors was that they did not conform to a sample which had been previously submitted; that the sample was submitted for the purpose of showing color only, and not as a sample of construction; that whatever defects there may have been in the floors constructed by Taft, they could have been corrected without their removal; and that no part of the floors was permitted to remain, but a sweeping condemnation was made of the entire work. Of course, the testimony of the witnesses for the defendant was in conflict with the testimony given in support of the allegations of the complaint. The letter of the architects to the Whitney Company under date of July 19, 1913, condemning the floors, states:

"These floors are entirely unsatisfactory and we are compelled to reject them and ask you to remove them from the building and replace these floors with floors of workmanship such as will comply with requirements of the contract.

"We cannot approve of the employment of the sub-contractor that you have had working on this work and we hereby inform you that you must either do this work yourself or have it done by some other sub-contractor.

"We wish to call your attention to the fact that you have not at any time presented to us the name of this sub-contractor to have our approval or disapproval of his employment for this work, and we ask you hereafter to be more careful if you have in your mind to sub-let any of your work."

The fact that Taft's subcontract was not submitted to the architects for their approval or disapproval is made a prominent feature of this letter. Taft claims that is the real reason why his work was condemned. Taking the contents of

this letter into consideration, together with the facts stated, as well as other facts and circumstances which appear in the record, the cause was properly submitted to the jury, whose province it was to determine from the evidence whether the architects had been arbitrary in condemning the work and ordering its removal, and whether the work done by Taft did in fact conform to the plans and specifications.

III. As appears from the facts stated upon the trial, evidence was admitted touching the question whether the floors constructed by Taft were equally as good as those subsequently constructed by the Whitney Company. Upon the introduction of this testimony, error is sought to be predicated. The admission of the evidence was not error for two reasons: First, while this line of testimony when first offered was objected to by the Whitney Company, the objection does not seem to have been insisted upon, counsel for the Whitney Company having stated subsequently during the trial that the only reason that he objected to this line of testimony was to save time. In addition to this, the testimony was admissible as bearing upon the question whether the architects had considered the merits of Taft's work when they ordered it removed, or whether the reason they condemned it was because this contract had not been submitted to them for their approval.

The judgment will be affirmed.

MORRIS, C. J., ELLIS, FULLERTON, and CROW, JJ., concur.

[No. 12130. Department Two. May 8, 1915.]

HERMAN DAHLGREN *et al.*, *Respondents*, v. CHICAGO,
MILWAUKEE & PUGET SOUND RAILWAY COMPANY,
Appellant.¹

WATERS AND WATER COURSES—ACTION FOR OBSTRUCTION—ISSUES AND PROOF—INSTRUCTIONS. In an action for damages for the alleged obstruction of the natural flow of "surface" waters, an instruction on "surface and other waters" is not erroneous as enlarging the scope of the issues, where it is apparent from the complaint that "surface waters" was used to designate waters coming from a large area and flowing through a natural water course which crossed their premises; since a particular statement controls a general term, in case of conflict.

TRIAL—ISSUES AND PROOF—INSTRUCTIONS. Although the pleadings might be obscure, the court could properly base instructions on evidence admitted without objection, which was broader than the pleadings.

WATERS AND WATER COURSES — OBSTRUCTION — NEGLIGENCE — INSTRUCTIONS. An obstruction of a water course by building a railroad embankment so as to prevent the natural flow of the waters in their accustomed channel, and thereby overflow plaintiffs' premises, is wrongful as to plaintiffs, regardless of negligence; and hence an instruction should eliminate negligence in the construction as an element of the wrong complained of.

SAME—INSTRUCTIONS. In an action for overflowing lands by obstructing a water course, an instruction that "the drain provided by the defendant to take care of the waters of the stream . . . must have been sufficient to take care of and dispose of the waters flowing down the stream at times of any ordinary freshet, but need not have been sufficient to provide against an unprecedented flow of high water," is not an invasion of the province of the jury as a determination of a question of fact, but merely states the rule as to the measure of duty the law imposed upon the defendants with regard to the drain.

TRIAL—INSTRUCTIONS—FAILURE TO COVER EVIDENCE—REMEDY. The remedy for instructions not sufficiently full to cover the entire evidence on a particular subject is to ask for further instructions, not to object to the instructions given.

CONSTITUTIONAL LAW—DUE PROCESS—CHANGE OF STREET GRADE—DAMAGING PRIVATE PROPERTY. An injury to an abutting property

¹Reported in 148 Pac. 567.

caused by a change in the grade of a highway, made necessary to carry the highway across the tracks of a railroad, is a taking and damaging of property within the meaning of the constitutional provision (Const., art. 1, § 16) relating to the taking and damaging of private property for a public use, even though the change is confined to the highway and does not extend to the property damaged.

WATERS AND WATER COURSES — OBSTRUCTION — CHANGE OF STREET GRADE—LIABILITY OF RAILROAD. A railroad company cannot escape liability for obstructing a water course by changing the grade of a street in the construction of an approach to the railway crossing of the street on the theory that it was a duty devolving upon the municipality, which service the railway company was employed to perform as a contractor and agent of the town, when it appears that the change in grade, as a part of the embankment and approach, was necessary to enable the railway to cross the street at a proper grade, that the town entered into no contract for the construction of the approach, nor furnished plans and specifications therefor, but had required in its franchise to the railway that suitable crossings and approaches should be maintained without expense to the town.

SAME — CHANGE OF ESTABLISHED GRADE — LIABILITY OF RAILROAD. In an action for flooding lands by the obstruction of a water course, a railway company, which changed the street grade by constructing an approach to its tracks, thereby raising the street above the grade as established, and flooding the lands, cannot escape liability for consequential damages on the theory that an original grade in use was lower than the established grade and that the grade put in by the railway at the requirement of the town was in the nature of an original or initial grade, where it was higher than and as variant from the established grade as the original grade.

SAME. An approach to a railway embankment constructed in a town street so as to afford a crossing at grade, under the authority of the town, would not exempt the railway company from liability for injuries caused to private property, where the franchise itself, under which the authority was exercised, provided that the company should be liable for all loss, damage and expense arising out of any injury to the property of any person caused by the construction of such railway.

MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE. While the owner of property in a municipality whose streets have been dedicated to a public use cannot complain of an initial or original grade, since it is conclusively presumed that it was intended by the dedicant that the streets should be made suitable for public convenience, grades made necessary by the building of commercial railways cannot be said to fall within the grant, such use being adverse to, and not within, the contemplated use.

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WATERS AND WATER COURSES—OBSTRUCTION—DAMAGES—INSTRUCTIONS. In an action for the wrongful obstruction of the natural flow of waters, instructions on the measure of damages are not objectionable as authorizing the jury to assess damages on a double basis, where on one cause of action recovery was allowed for the obstruction of the natural channel of a stream on one side of the plaintiffs' premises, and for the loss of use of the premises for two years next preceding the action, and in the other cause of action recovery was allowed for permanent injuries caused by waters being cast on plaintiffs' property by reason of elevation of the street grade on another side of the premises, and for loss of the use of the property for two years next preceding the action.

TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS. The refusal of requested instructions based on defendant's theory of the case was proper, when not in conformity with the correct theory adopted by the trial court.

APPEAL AND ERROR—VERDICT—CONCLUSIVENESS—AMOUNT OF DAMAGES. A verdict awarding damages will not be interfered with as excessive, when the question of amount was wholly within the province of the jury, and there was evidence to support the award.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered February 9, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort. Affirmed.

F. M. Dudley, G. W. Korte, and C. H. Hanford, for appellant.

C. H. Graves, for respondents.

FULLERTON, J.—The respondents, plaintiffs below, brought this action against the appellant to recover in damages for the alleged wrongful obstruction of a water course, causing injury to their real property. In their complaint the respondents alleged that they were the owners of certain described real property in the city of Monroe, abutting upon Ann street therein, which they used for a home, the same having thereon a valuable two-story residence, with the necessary outbuildings, fruit and ornamental trees, garden plot, flowers and lawn, the same being a highly improved residence property.

"That during the year 1910 the defendant, its officers and agents, servants and employees, built and constructed a large fill or embankment as a road-bed for their railway, paralleling the south line of plaintiffs' said property, and upon a line some 175 feet to the south thereof. That said embankment is constructed of solid earth, and is from 12 to 15 feet in height and extends the full length of plaintiff's property in an easterly and westerly direction, and intersects said Ann street at right angles and extends either way therefrom for a considerable distance.

"That said embankment as constructed by said railway company completely cuts off and obstructs the natural flow and drainage of all surface waters coming from plaintiffs' premises and from the vicinity and from a large area to the north thereof. That prior to the building of said embankment, all of said surface waters flowed naturally and without hindrance in a southerly direction over and across the area now used by defendant's road-bed, through natural water courses and channels which crossed plaintiffs' premises and the adjacent premises; and that defendant has so carelessly and negligently constructed its said embankment as aforesaid that said natural water courses and channels are completely filled up, and the natural flow of all the surface waters in the vicinity completely obstructed, and that defendant has made no suitable or proper provisions to take care of the same, causing said waters to back up and overflow upon plaintiff's premises, which would not otherwise come thereon, so that at times the whole thereof is flooded to a depth of several feet, resulting in great injury and damage to plaintiff's residence, buildings and other improvements, further causing plaintiffs' lands continuously since the building of said fill as aforesaid to be and remain wet and covered more or less with water at all times, rendering the same unfit and unsafe for residence or other purposes; and whereby plaintiffs' said residence is greatly endangered and rendered unsafe and unhealthful, and the value of their property greatly impaired and lessened."

For a second cause of action, it was alleged:

"That during the year 1912, the defendant, its officers, agents, servants and employees, constructed and built an approach on said Ann street in the city of Monroe, in order

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to meet the grade of the aforesaid embankment at its crossing of said street, and that said approach was made by filling in said street with earth to the full width thereof, and raising the established grade thereof from a point at or about twenty feet north of the south line of plaintiffs' property and extending south some 175 feet to the Ann street crossing. That said fill as constructed is upon a five per cent grade, more or less, between said points, and was made by the defendant by consent and permission of the city council and mayor of said city of Monroe, but upon the express condition that said railway company would be responsible for any and all damages occasioned thereby to adjoining property owners or others.

"That said fill and change of grade completely stops and obstructs the natural flow of all surface waters along and from said street, and for a considerable distance to the north thereof, also causing all surface waters from said fill to the south of plaintiffs' property to be brought down thereon, and collecting all of said water from both directions at a point in the street immediately in front of plaintiffs' property, and discharging the same over and upon the same, which would not otherwise flow thereon, making the ground wet and unfit for residence purposes at all times, and greatly injuring plaintiffs in the use and enjoyment thereof; and the value of their property is greatly impaired and depreciated."

The answer put in issue the traversable allegations of the complaint, and for a separate defense, set up the following:

"That by an ordinance, numbered 91, entitled 'An ordinance granting to the Chicago, Milwaukee & Puget Sound Railway Company, its successors and assigns, the right, privilege and authority to locate, lay down, construct, maintain and operate railway tracks upon, over and across certain streets, avenues and highways in the city of Monroe, county of Snohomish and state of Washington, together with all telegraph and telephone lines and appurtenances necessary or convenient to the operation of said railway tracks,' which ordinance was passed September 28, 1910, the said town of Monroe granted unto this defendant the right, privilege, authority and franchise to locate, construct and maintain a standard gauge railway, consisting of one or more tracks, and such telegraph and telephone lines and ap-

purtenances as might be necessary or convenient for the operation and maintenance of said railway, and to operate said railway by electricity, steam or other mechanical power, upon the conditions prescribed in said ordinance, upon, along and across certain streets, avenues, alleys and public places in said town, including among others, the following, to wit:

“All that portion of Ann street, in said town, lying between the south line of Lot 9 and the north line of Lot 10, in Block 1, in Tye City Plat, respectively, produced westerly across said Ann street.”

It was by said ordinance, among other things, provided as follows:

“Section II. There shall be maintained without expense to the town of Monroe at all points where said railway crosses or occupies any public streets, avenue, alley, road or public place in the town of Monroe, by virtue of this franchise, suitable crossings and approaches, the entire width or distance of such occupancy of any and all such streets, avenues, alleys, roads and public places, for all wagons and other vehicles, and for pedestrians, to conveniently accommodate all travel on, along and across said railway.

“Section III. During the construction and maintenance of said railway the grantee shall take all proper precautions to guard against danger or accident to any person, and it shall be liable to the town of Monroe for all loss, damage and expense to it arising out of any injury to the person or property of any person or corporation caused by the construction or maintenance of said railway, and shall save the said town harmless during the entire term of this franchise from any and all such loss, damage and expense; and shall lay and maintain the said railway in such manner that the same will not interfere with the use of said streets, avenues, alleys or public places to any greater extent than is reasonably necessary for the exercise and enjoyment of the rights herein granted.”

“That after the passage of said ordinance this defendant duly accepted the same, and thereafter constructed its railway over and across said Ann street upon a fill or embankment, and constructed a crossing over said track at said Ann street, with approaches thereto upon each side of said railway. That thereafter the said town of Monroe com-

plained unto this defendant that the grade of its approaches was too steep, and requested this defendant to extend said approaches so as to lessen the grade thereof. That in the year 1912 this defendant, pursuant to said request, did extend said approaches, beginning the northerly approach (being the approach referred to in the second paragraph of the second cause of action in said complaint alleged) at a point at grade at the south line of plaintiffs' property produced across Ann street, and extending thence southerly approximately 175 feet to the railway tracks of this defendant. That said grade as constructed is between four and five per cent between said points; and that it was so constructed by this defendant at the instance and request of the said town of Monroe, and solely because of said request. That in so constructing said approach this defendant acted as the agent of said town of Monroe in making said grade, and that said town is a proper and necessary party defendant herein."

To this affirmative defense, a demurrer was interposed, which the court sustained. A trial was thereupon had before the court and a jury on the remaining issues, resulting in a verdict and judgment in favor of the plaintiffs in the sum of \$350 on their first cause of action, and \$150 on the second.

The evidence tended to show the following: The respondents own and occupy certain lots in the city of Monroe, abutting upon the west side of Ann street, a street extending north and south through the city, and which at its north end opens into a county road. The street had been improved by the city authorities by graveling the surface thereof, and by the construction of sidewalks and curbs along its margins, and was one of the principal thoroughfares of the city. The property of the respondents was well improved, and had thereon a good dwelling house, outbuildings, trees, shrubbery, flower beds, a vegetable garden, and a chicken yard. The ground was bottom land sloping slightly to the southwest. West and northwest of the property is a hill, which for a considerable distance from the property gathers drainage waters which flow in a natural channel or gully at the base of the hill, making a flowing stream throughout the year

except in the driest months. The gully crosses the west end of the respondents' premises and empties into a creek some distance to the southeast thereof, known as Woods creek.

In the fall of 1910, and winter of 1910-1911, the appellant constructed a branch line of its railroad through the city of Monroe. The road ran parallel to the south line of the respondents' premises and about one hundred and seventy-five feet distant therefrom, crossing Ann street at a right angle. For its roadbed, the railway constructed an embankment some twelve feet high. The embankment crossed the gully before mentioned, filling up the same and destroying it as a drainage channel. In lieu thereof the railway company inserted a twelve-inch tile pipe, leading through the embankment, placing it, however, some two feet higher than the bottom of the original gully. The land of the respondents, according to the testimony in their behalf, was not drained as effectively as it was prior to the construction of the embankment, the result being that water stood for the greater part of the year around the intake of the tile pipe, percolating back upon the property of the respondents causing it to become and remain wet and soggy, thereby destroying the trees and shrubbery growing thereon, and rendering it unfit for garden purposes.

To make a crossing over its tracks in Ann street, the appellant was required to, and did, construct a slope from the top of its embankment northward down to the existing surface of Ann street the full width of the street, the toe or end of the slope extending beyond the south line of the respondents' property. The company also constructed westerly and southwesterly of the respondents' property another embankment, extending from its principal embankment to the foot of the hill before described as being on the west and northwest of the property, on which they constructed a wye; the effect of the several embankments being to form a basin surrounding in part the respondents' property. It also appeared from the testimony that the country surrounding this district

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was subject to periodical freshets, which prior to the building of the railway embankment were wont to pass away in other directions, but which subsequent thereto were caught by the embankment and caused to flow over the respondents' land to the outlet furnished by the twelve-inch tile pipe, depositing sand, gravel and other debris thereon. It was in evidence also that the pipe was insufficient in size to take care of the water as fast as it accumulated during such freshets, and in one such freshet, occurring in January, 1912, the water backed up and overflowed the greater part of the respondents' premises.

The errors assigned and discussed in the brief which relate to the first cause of action are suggested by the instructions of the court given on that branch of the case; those complained of being the following:

"The gist of this action is contained in paragraph 5 of the complaint, and consists of an allegation that the defendant wrongfully obstructed by means of the construction of its roadbed across and therein a natural water course and channel, which crossed the plaintiffs' lands and adjacent lands, and, by such construction of its roadbed, stopped, and impeded and interfered with the natural flow of the surface and other waters which gathered in such channel or bed, causing the same to flood the premises of the plaintiffs, to their damage and injury.

"In this connection you are instructed that if you shall believe from a fair preponderance of the evidence, as that term is hereinafter defined to you, that the following facts are established: That at the time of the construction of the embankment which constitutes its roadbed by the defendant there was a natural creek or water course crossing the property of the plaintiff and extending down to and beyond the point at which the embankment or roadbed was built, which channel was filled up or obstructed by such embankment or roadbed, and that the natural flow of waters through the creek or water course was impeded and obstructed, and that the defendant did not make some suitable and adequate provision for draining away the water flowing through such creek or water course, including the water which could be reasonably

anticipated to flow through such bed or course during times of ordinary high water, and that, by reason of such obstruction, or such failure to provide adequate and proper drainage or outlet, the waters naturally flowing through such bed or creek caused to back upon or overflow or seep through intervening lands into the soil of plaintiffs' lands, to the damage and injury of the plaintiffs, then your verdict shall be for the plaintiffs, in such sum as you shall fix.

"In this connection you are instructed that any drain provided by the defendant to take care of the waters of the stream, if you shall find there was one, as above, must have been sufficient to take care of and dispose of the waters flowing down the stream at times of any ordinary freshet, but need not have been sufficient to provide against any unprecedented flow of high water.

"You are further instructed that if you shall find in favor of the plaintiffs upon the first cause of action, the measure of their recovery shall be such sum as you shall deem to be the difference, if any, between the fair cash market value of their property before the obstruction of the stream and its present fair cash market value in view of the conditions which now exist, together with such sum as you shall find, from a fair preponderance of the evidence, fairly and reasonably compensates the plaintiffs for any loss they may have sustained by being interfered with in their use of the premises in question during the two years preceding the commencement of their action on the 5th day of November, 1913, and no longer; and in no case can your verdict on the first cause of action exceed in amount the sum of \$1,500.

"Difference in fair cash market value, as used in these instructions, means, of course, reduction, for unless the fair cash market value was reduced, the plaintiffs are not damaged in that respect. Further, any sum allowed the plaintiffs by you on account of this cause of action must be found by you from a fair preponderance of the evidence to have been the direct and proximate result of the wrong complained of in the first cause of action, which is the obstructing of the stream."

It is first objected to these instructions that they enlarge the scope of the issues, in that the complaint relates only to "surface waters," whereas the instruction refers to "surface

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and other waters," thus placing upon the appellant the duty of taking care of all of the waters flowing down the water course or gully which passed the respondents' premises, whether the same be surface waters or waters arising from sources that cannot be called such; a duty with the performance of which it was not charged in the complaint. But we think the appellant places a too narrow construction upon the allegations of the complaint. While the term "surface waters" is used to describe the waters flowing down the channel, yet we think it apparent that the respondents meant to designate thereby all of the waters that were wont to flow by nature down such channel, and that the pleading would be ordinarily so understood. Surface waters, in a technical sense, are waters of a casual or vagrant character having a temporary source, and which diffuse themselves over the surface of the ground, following no definite course or defined channel, while here the waters are described as coming from the vicinity of a large area to the north of the respondents' premises and flowing naturally and without hindrance through a natural water course and channel which crossed such premises. The description is that of a natural and regular water course, rather than that of a mere casual overflow. If in a pleading a given thing be described generally, as by a name, and afterwards particularly, as by a statement of its conditions, purposes or functions, and there be a conflict between the two, the particular will control the general.

But if the pleadings be obscure on the particular question, the testimony introduced thereunder without objection was not so. The testimony showed a stream flowing in a well defined channel, continuous for some nine months of the year, and that it was this particular channel that the appellant closed to the injury of the respondents. Where evidence is introduced without objection, the court may properly base its instructions thereon, even though the evidence be broader than the pleadings.

A second contention is that the instruction erroneously eliminated negligence as an element of the wrong of which complaint is made. But if it be meant by this that it was necessary for the respondents to show, in addition to the fact that the construction of the embankment caused them an injury, that the work of construction was performed in a negligent manner, we cannot agree with the contention. It is doubtless true, as the appellant argues, that it had a lawful right to construct an embankment for the use of its railway, but it does not follow that it had a lawful right to construct it in such a manner as to cause injury to the property of the respondents. It is not a case of *damnum absque injuria*. On the contrary, if the embankment impeded a natural water course, and left no sufficient vent for the escape of the water, and the water was caused thereby to overflow the premises of the respondents to their injury, the construction was negligent and wrongful as to the respondents, no matter how carefully the work of construction was performed.

It is said, further, that the instruction invades the province of the jury, because the court stated therein that "the drain provided by the defendant [appellant] to take care of the waters of the stream . . . must have been sufficient to take care of and dispose of the waters flowing down the stream at times of any ordinary freshet, but need not have been sufficient to provide against any unprecedented flow of high water." But clearly the court here determined no question of fact. It but stated the measure of duty the law imposed upon the appellant with regard to the drain. And we think it correctly stated the rule. If it has fault at all, the fault lies in the fact that it is not sufficiently full to cover the entire evidence on the particular subject. But the remedy for this defect is to ask for further instructions, not to object to the instruction given.

With reference to the second cause of action, the court gave to the jury the following instruction:

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"You are instructed that in reference to the second wrong alleged to have been done the plaintiffs by the defendant in the so-called second cause of action, the gist of it appears in paragraph 2 of said second cause of action in the amended complaint, and consists of the allegation that the defendant constructed an approach to Ann street for the full width thereof by filling in said street with earth, and thereby raising the formerly established grade thereof, and thereby causing surface waters to flow upon the lands of plaintiffs which had not formerly flowed upon such lands to the plaintiff's damage and injury. In this connection you are instructed that if you shall believe the following facts to be true, from a fair preponderance of the evidence in this case—that is, that prior to and at the time the defendant built the approach referred to on north Ann street that said street had an established grade fixed by the action of the town of Monroe through its Town Council, and that by reason of the raising of said street by said approach and the consequent change of the grade thereof, waters were caused to flow upon or across the lands of the plaintiffs which had not previously by the originally established grade flowed upon said lands, then and in that case the plaintiffs are entitled to recover a verdict at your hands in the second cause of action. Unless you find from a fair preponderance of the evidence the foregoing facts, your verdict should be for the defendant upon the second cause of action."

There was evidence in the record tending to show that the approach mentioned in the instruction was authorized by the town of Monroe; that is to say, the railway company, in part consideration of a franchise for its railway through the town of Monroe, agreed with the town authorities to construct suitable crossings over its railway tracks for vehicles and pedestrians at all places where its tracks passed over the existing streets of the town. The evidence also tended to show that the town had, at some time prior to the construction of the railway, established a grade upon Ann street, and had improved the street by graveling the same and by the construction of sidewalks and gutters thereon. It appeared, however, from the testimony of an engineer

called by the respondents, that the surface of the street was not brought by the improvement to the line of the established grade; that its surface was throughout somewhat lower than that required by such grade, and lower by two feet or more where it passed in front of the respondents' property. The instruction of the court last quoted, it will be observed, proceeded on the theory that if there had been an established grade upon Ann street, and that grade had been changed by the construction of the railway and the approaches thereto, the railway company was liable to the respondents for any damage to their property caused thereby. If we have correctly gathered the appellant's contention, it contends that the instruction is erroneous for two reasons, first, because the appellant, in raising the grade of the street, acted as contractor and agent of the municipal government of the town of Monroe, and is exempt from liability to owners of abutting property for consequential damages not attributable to its own negligence; and, second, that the evidence conclusively shows that there was in fact no established grade upon Ann street, and consequently the grades put in by the railway at the requirement of the town are in the nature of original or initial grades for which no liability attaches for consequential damages.

These contentions are, we think, untenable for a number of reasons. It is held by almost universal authority that an injury to an abutting property caused by a change in the grade of a highway, made necessary to carry the highway across the tracks of a railroad constructed thereover, is a taking and damaging of property within the meaning of a constitutional provision relating to the taking and damaging of private property for a public use, even though the change is confined to the highway and does not extend to the property damaged. Hence, in this case, if it be the fact that the construction of this approach damaged the respondents' property, either the town of Monroe or the railway company, individually, or both jointly, are liable therefor. The appel-

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lant, to exempt itself from liability, contends for the theory that the construction of this approach was a duty devolving upon the city; that the city employed it to perform the service as a contractor and agent of the city; and that it is in consequence responsible only for damages caused by its negligent performance of the work, not for damages caused by the change of grade, defect in the plans, or other causes inherent in the nature of the work. But the facts are opposed to this theory. The change in the grade, the embankment and the approach were necessary to enable the appellant to cross the street with its railway at a proper grade, and were made wholly and solely for its benefit. The town entered into no contract with it for the construction of the approach. It provided it with no plans or specifications. It reserved no right to superintend or direct the work. It simply provided in the ordinance granting the franchise that "there shall be maintained, without expense to the town of Monroe, at all points where said railway crosses any public street . . . in the town of Monroe, suitable crossings and approaches, the entire width of or distance of such occupancy of any and all such streets . . . for all wagons and other vehicles and for pedestrians to conveniently accommodate all travel on, along and across said railway." The appellant was, therefore, at liberty to adopt its own plan for constructing the approach, and to construct it out of such materials and in such manner it pleased, subject only to the limitation that the approach when constructed should be suitable for the purposes for which it was intended and extended to the full width of the street. And if, having this liberty of choice, it adopted a plan and constructed the approach in such a manner as to injure the respondents' property, we can conceive of no reason why it is not primarily liable for such injury.

Again, we think the evidence justified the jury in finding that there was an established grade along the street in question. It was shown by the minutes of the town that the town

council, by resolution, authorized its improvement committee "to confer with the town engineer concerning the proper grade of North Ann street," and that subsequently "the grade of Ann street was established in accordance with the engineer's recommendation, and according to plans and profiles prepared by the town engineer, now on file in the office of the town clerk, which plans show the elevation of the grade . . .," and that later on the street was improved in the manner hereinbefore recited. True, the street as improved did not conform in its elevation in all respects to the established grade, but clearly this did not render the entire proceedings nugatory, or subject the street to changes by the town council, or persons acting under its authority without liability to property owners injured by such change. Had the change in the surface of the existing highway made by the appellant conformed to the established grade, there would have been some basis for its contention of nonliability for injuries caused thereby. But it did not so conform. Its so-called grade began at the existing surface of the street some two feet or more below the established grade, and ended to a point an equal distance at least above the same. It is difficult to understand why a street constructed by the town is not an original grade merely because it did not conform in all respects to the established grade, while a grade constructed under the authority of the town by a railway company for its own benefit, equally variant from the established grade, is an original grade.

But we think the ruling of the trial court may rest on broader grounds. The approach to the embankment on which the railway tracks rest was made necessary because of the embankment, and is to all intents and purposes a part of the embankment. While it was put in under authority of the city, and is a lawful structure to that extent, such authority did not exempt the railway company from liability for injuries its construction caused to the private property of individuals. The railway company's privileges in this regard

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are not different in the town of Monroe than they are on other parts of its right of way. It is subject here as elsewhere to the rule of the constitution that private property shall not be taken or damaged for public use without just compensation to the owner of the property taken or damaged. But the town did not in this instance attempt to exempt the railway company from such liability. On the contrary, it provided in the franchise which it granted the railway company that the railway company should be liable "for all loss, damage and expense to it arising out of any injury to the . . . property of any person . . . caused by the construction or maintenance" of such railway.

Again, we think the rules relating to original grades of streets and changes therein have no applicability to cases such as that here presented. The doctrine that the owner of property in a municipality whose streets have been dedicated to a public use cannot complain of an initial or original establishment of grades along such streets is rested on a grant implied from the act of dedication; it is conclusively presumed that it was intended by the dedicator that the streets should be made suitable for the public conveniences, and that reasonable grades are necessary for such conveniences. Grades made necessary by the building of commercial railways over and along the streets cannot be said to fall within the grant. The building of such railways is adverse to, rather than within, the contemplated use.

It is complained that the instructions given on the measure of damages authorized the jury to assess damages on a double basis, but we do not so read them. The respondents were allowed to recover on the first cause of action for the permanent injury caused their property by reason of the obstruction of the natural channel of the stream, and for the loss they sustained by reason of being interfered with in the use of the premises during the two years next preceding the commencement of the action. On the second cause of action, they were allowed to recover for permanent injuries caused

by waters being cast on their property by reason of the embankment there mentioned, and for such loss of use of the property as such embankment caused for the two years next preceding the commencement of the action. These we think were proper elements on which to base a recovery.

The instructions requested were properly refused. They were based on the appellant's theory of the case, and while appropriate to that view, are inappropriate to the view adopted by the trial court, which we hold to be correct. So with the error assigned upon the ruling sustaining the demurrer to the affirmative defense, it was likewise based upon a theory contrary to that adopted by the trial court and which we hold to be correct.

Lastly, it is said that the damages awarded are excessive. But the question of the amount to be awarded was one so far wholly within the province of the jury that it ought not to be interfered with unless it is plainly without support. We think the evidence in this instance justified the award.

The judgment is affirmed.

MOUNT, MAIN, ELLIS, and CROW, JJ., concur.

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Syllabus.

[No. 12133. Department Two. May 8, 1915.]

ARTHUR BECK, *Appellant*, v. INTERNATIONAL HARVESTER
COMPANY OF AMERICA, *Respondent*.¹

TRIAL—DIRECTION OF VERDICT — CORRECTION OF ERROR — JUDGMENT NOTWITHSTANDING VERDICT. The action of the court in rendering judgment *non obstante veredicto*, after overruling a motion for nonsuit and a challenge to the sufficiency of the evidence, was proper, where there was no sufficient evidence on which to base a recovery introduced at the trial; since, if the court decided erroneously in the first instance, its powers were ample to correct its error at any time before the entry of a final judgment.

SAME—TIME FOR MOTION. Where judgment on a verdict has not been actually entered, the court would not be precluded from rendering judgment *non obstante* from the mere fact that a right existed to entry of judgment on the return of the verdict.

SAME—TAKING CASE FROM JURY. Where there is a substantial conflict in the evidence, the court has no right to determine, as a question of law, a motion for nonsuit, a challenge to the sufficiency of the evidence, or a motion for a judgment notwithstanding the verdict, on the ground that the party holding the affirmative has failed to prove a cause for the jury.

MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANTS—SUFFICIENCY OF EVIDENCE. An employee injured while unloading machinery from a car, due to the carelessness of another employee in not securely fastening pieces remaining after the removal of an outside piece, cannot recover on the ground that a fellow employee was selected by the master as its representative and that he allowed the place to become unsafe, where it appears that the work was not out of the ordinary and was commonly performed without direct supervision; that there was no hidden danger and plaintiff had been engaged in similar work and was not working under the supervision of his fellow employee, both being employed as common laborers at the same wages; and the order of the foreman given to unload the cars was directed to the one as much as to the other.

SAME—VICE PRINCIPAL. The fact that a fellow servant, in the progress of work in the same common employment, assumes to give directions to other fellow servants necessary to secure concert of action and facilitate the work, does not elevate him into the position of a vice principal.

¹Reported in 148 Pac. 35.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered November 3, 1913, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee engaged in unloading machinery from a car. Affirmed.

A. O. Colburn and C. D. Randall, for appellant.

Belden & Losey, for respondent.

FULLERTON, J.—The appellant while an employee of the respondent was injured in the course of his employment, and brought the present action to recover in damages therefor. After issue joined, a trial was entered upon before the court sitting with a jury. The appellant presented his case in chief, whereupon the respondent moved for a nonsuit against him on the ground that he had failed to prove a sufficient cause for the jury. This motion the court overruled. The case then proceeded to the close of the evidence, when the respondent challenged its sufficiency to sustain a judgment in favor of the appellant. This challenge was likewise overruled. The cause was then submitted to the jury, who returned a verdict for the appellant in the sum of \$2,000. Within two days thereafter, the respondent moved for a judgment notwithstanding the verdict, and, in the alternative, for a new trial. The court sustained the motion for judgment *non obstante*, entering a judgment to the effect that the appellant take nothing by his action. From the judgment so entered, this appeal is prosecuted.

The appellant first contends that the trial court, after overruling the motion for a nonsuit and the challenge to the sufficiency of the evidence, was not warranted in granting a motion for judgment notwithstanding the verdict. If we have correctly gathered the meaning of his learned counsel, the contention is that these rulings became the law of the case, and the court exceeded its powers in granting a judg-

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ment on the ground that no cause of action had been proven, after it had, during the course of the trial, refused to sustain a motion or challenge timely interposed based upon the same ground. But the appellant has mistaken the rule. If it be true that there was no sufficient evidence on which to base a recovery introduced at the trial, and the court erroneously decided otherwise, its powers were ample to correct its error at any time before the entry of a final judgment. This we have held in a number of cases. In *Shepard v. Gove*, 26 Wash. 452, 67 Pac. 256, the defendant demurred to the plaintiff's complaint on the ground that the action had not been commenced within the time limited by law. This demurrer the then presiding judge overruled. Afterwards there was a change in the personnel of the court, and the defendant renewed the objection before the succeeding judge, who sustained the objection. It was contended that the succeeding judge was without power to overrule a decision of his predecessor in office. The court denied the contention, using this language:

"It is insisted by the appellant that Judge Griffin had no right to overrule a decision made by Judge Jacobs in the case. But the succession of judges cannot be considered by this court; the office is a continuing one; the personality of the judge is of no legal importance. The action of Judge Griffin was in legal effect a correction of his own action, which he deemed to have been erroneous; and it were far better that he should correct it, than to perpetuate an error which would have to be corrected by this court."

In *State ex rel. Brown v. Board of Dental Examiners*, 38 Wash. 325, 80 Pac. 544, Judge Hatch, presiding in the superior court, made an order requiring the board of dental examiners to produce certain papers in their possession, and the cause was continued for that purpose. When the case was again called, Judge Rudkin presided, and it was sought to have him enforce the order of Judge Hatch. He declined so to do, and on appeal his refusal was assigned as error. This court refused to entertain the contention, saying:

"As to the first error—in refusing to enforce the order of Judge Hatch in relation to the testimony asked for—if Judge Hatch had continued to sit in the case, when the testimony was offered, and if it had appeared to the judge that it was not competent testimony under the pleadings, he would have had a right to reject it notwithstanding his former order. No further limitations could be placed upon the power of Judge Rudkin, who succeeded him in the trial of the cause; and, as we view the law on this subject, the admission of such testimony would have constituted reversible error."

In *Toutle Logging Co. v. Hammond Lumber Co.*, 78 Wash. 568, 139 Pac. 625, almost the precise question here presented was determined. There the court sustained a challenge to the sufficiency of the evidence after it had refused to grant a nonsuit. On the appeal the action of the court was claimed to be erroneous on the ground that the court was without power to change its ruling. But the court denied the claim, saying that to sustain it would be to hold "that errors committed at one stage of the case could not be corrected by the trial court at a later stage therein," and that such was neither the rule nor the practice.

In *State v. Riley*, 36 Wash. 441, 78 Pac. 1001, a criminal case, the court overruled an objection to the admission of testimony based on the contention that the information did not state facts sufficient to constitute a crime. The defendant was convicted, and subsequently the court granted a new trial and permitted the prosecuting attorney to file another information against the defendant correcting the original information. A second conviction followed, and on the appeal therefrom it was contended that the ruling of the court holding the first information sufficient became the law of the case binding upon the superior court, and was not subject thereafter to modification or change by it. The court denied the contention, saying in the course of the opinion:

"It is not error for a court to allow the information to be withdrawn, and another more perfect one be substituted in its stead. *State v. Gile*, 8 Wash. 12, 35 Pac. 417; *State v.*

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Hansen, 10 Wash. 235, 38 Pac. 1023; *State v. Lyts*, 25 Wash. 347, 65 Pac. 530. Nor was it error to do so after the court had first considered it and adjudged it sufficient. No litigant has a vested right to have an error perpetuated in the record. If the trial court finds, at any stage of the proceedings prior to the entry of final judgment, that it has committed an error that will render its final judgment voidable or void, it is not only its right but its duty to correct it."

The cases of *Weir v. Seattle Elec. Co.*, 41 Wash. 657, 84 Pac. 597, and *Messir v. McLean*, 51 Wash. 140, 98 Pac. 106, cited by the appellant, are not contrary to the principle announced in the foregoing cases. In these cases it was held that it was not within the province of the trial judge to take a cause from the jury and determine it upon conflicting evidence, however preponderating the evidence may have been in favor of the one party or the other; that he could, in the exercise of his discretion, grant a new trial if he thought the jury had decided against the weight of the evidence, but it was not held that he was without power before final judgment to correct at one stage of the trial an erroneous ruling made at an earlier stage therein.

The appellant further cites the case of *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490, to the point that the court exceeded its power in granting the motion for judgment *non obstante*. It is contended, on the authority of that case, that, since the respondent's motion for nonsuit and challenge to the sufficiency of the evidence were overruled, and that the court made no direction that a judgment be not entered on the return of the verdict, the motion for judgment *non obstante* could not be entertained even though no formal judgment was entered by the clerk prior to the time the motion was interposed. The case cited, however, does not so hold. There the clerk entered judgment on the verdict immediately on its return by the jury, and the motion for judgment *non obstante* was made after the entry of such judgment, and it was held that the motion could not be entertained because of

the entry of a judgment on the verdict; holding, further, that the only right to move after the entry of judgment was the statutory right to move for a new trial, or to vacate under the provisions of the code relating to the vacation of judgments. Here the clerk did not enter the judgment the statute contemplates on the return of the verdict of the jury. The only judgment appearing in the record is the one appealed from, entered under the direction of the court after the motion for a judgment *non obstante* had been sustained. The fact that the right to a judgment on the return of the verdict existed, cannot be held to be the equivalent of the actual entry of a judgment.

But as the court cannot rightfully determine as a question of law a motion for nonsuit, a challenge to the sufficiency of the evidence, or a motion for a judgment notwithstanding a verdict, on the ground that the party holding the affirmative has failed to prove a cause for the jury where there is a substantial conflict in the evidence, it remains to inquire whether there is in this record any substantial evidence on which the verdict returned in his favor can be sustained.

The respondent is engaged in the manufacture and sale of farming machinery, and, in the conduct of its business, operates warehouses in the city of Spokane, where it receives shipments of such machinery in car load lots, and from whence it distributes such machinery in lesser lots throughout the surrounding country for the purposes of sale. At its warehouses it has a general manager and at least one general foreman, and employs a number of laborers who work under the direction of these officers. The appellant, at the time of the injury for which he sues, was one of such employees, and had been such for some three months prior thereto, although not steadily employed, having worked but some thirty-six days during that period. In the latter part of June, 1912, the respondent received at one of its warehouses two car loads of headers. These were shipped in a dismantled condition. In loading, the parts thereof called the platforms were first in-

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serted in the cars. These were left for carriage in their made up forms, and formed pieces some fourteen feet in length, four and one-half feet wide, and some three and one-half or four inches in thickness, and severally weighed five hundred and fifty pounds. The platforms were the first pieces put into the cars. In the process of loading, a platform was carried through the side door of the car and stood on its edge against the side of the car, with one end abutting against the end of the car; the second was then brought in and stood by the side of the first, and so on until all were loaded. The cars carried seven headers each, and the platforms took up a space in the corner of the car equal to their height and length and about three feet in width. The remaining room in the car was then packed with the remaining parts of the headers, which were contained in crates and boxes, in such manner as to form a compact mass which would remain in place during transit.

On the morning of June 27, 1912, the appellant and one Bittinger were directed by the general foreman to unload the cars. They were told that, when they had removed the parts of the headers other than the platforms two other men would be sent to assist them. In removing the headers, the parts had to be taken out practically in the same order in which they were placed in the cars, and it was in this manner that the appellant and Bittinger proceeded with the work of unloading. By four o'clock in the afternoon they had succeeded in removing all the parts of the headers except the platforms, and at that hour two other employees were sent to assist them. When the platforms had been put in place in loading, to steady them until they could be packed in with the remaining parts, binding twine had been used to fasten them to the wall of the car. This had become broken during the transit, and to prevent their falling while the other parts were being removed, they were fastened in place in the one car by strands of baling wire tied to a nail driven in the wall of the car about midway of the length of the platforms and brought over their upper sides and then tied to a bolt on

the outside platform, and in the other by a scantling placed with one end against the outside platform and the other against the opposite wall of the car.

The workmen removed the platforms from the first car without accident. In doing so they would steady the platforms against the wall of the car, would then remove the wire from the outside platform and fasten it to a similar bolt on the next succeeding one; they would then throw out the end of the loosened platform next the car door so as to have a clearance space, raise up the end and place under the platform near its middle a small wheeled carrier, and would balance the platform on the carrier and then wheel it to its place of deposit in the warehouse.

After the first car had been thus unloaded, the appellant went after a drink of water. While he was absent the other workmen entered the second car and fastened the platforms (leaving the outer one free) to the side of the car in the same manner the platforms were fastened in the other car. They then removed the brace, loaded the free platform onto the carrier, and were wheeling it away when the appellant returned. The appellant did not assist in wheeling this platform into the warehouse, but remained in the car. He testified that, in order to get the next platform ready for removal on the return of the other workmen, he took the piece of scantling and pried out the bottom of the outside platform on the end next the door, and was proceeding to the other end to pry that out when the wire fastening gave way, allowing the platforms to fall over upon him, causing the injury for which he sues.

To sustain his right of recovery, the appellant contends that the work was of such a character as to require supervision by the master; that Bittinger was selected by the master as its representative for that purpose, and that he negligently performed his duties, in that he allowed the place of work to become unsafe by insecurely fastening the platforms to the wall of the car, and that the appellant's in-

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juries were thus the result of the negligent performance of a duty enjoined upon the master. But we cannot accept these contentions as justified by the facts in evidence. Clearly there was nothing out of the ordinary in the nature of the work. It was such work as is commonly performed by men without direct supervision, and it would seem that if it legally required the presence of the master, there would be no character of work which required the cooperation of two or more workmen that the master is not required to supervise. The appellant does not claim that he was unaware of such dangers as existed in the work. This he could not well do, as there was nothing hidden or concealed about it. Moreover, he was a man of mature years, and had been engaged during the time of his employment with the respondent in work of a similar character, and had at one time at least assisted in removing similar platforms from the cars. Nor is there any evidence from which the jury were warranted in finding that the appellant was working under the supervision of Bittinger. They were both employed as common laborers, each received the same wages, and the order of the general foreman given to unload the cars was as much directed to the one as to the other. It may be true that, in the process of the work, Bittinger assumed to give such directions as were necessary to secure concert of action. But this does not make him the representative of the master. As we said in *Ponelli v. Seattle Steel Co.*, 64 Wash. 269, 116 Pac. 864:

"To hold that every time one servant suggests a plan for doing the work, or calls upon another servant to do something which in his judgment will facilitate the work, in making the suggestion or in directing the other servant, he becomes a vice principal and fixes a liability upon the master for any injury incurred in following the suggestion, or in accepting the direction where the duty of superintendence had not been intrusted to him by the master, would be to go further than any case with which we are familiar, and announce a new rule with no legal principle for its support."

See, also, *Jock v. Columbia & Puget Sound R. Co.*, 58 Wash. 437, 102 Pac. 405; *Desjardins v. St. Paul & Tacoma Lumber Co.*, 54 Wash. 278, 102 Pac. 1034; *Mercer v. Lloyd Transfer Co.*, 59 Wash. 560, 110 Pac. 389; *Cavelin v. Stone & Webster Eng. Corp.*, 61 Wash. 375, 112 Pac. 349; *Swanson v. Gordon*, 64 Wash. 27, 116 Pac. 470.

As we view the record, there was no negligence shown on the part of the employer. The motion for judgment notwithstanding the verdict of the jury was therefore rightfully granted, and the judgment will stand affirmed.

MOUNT, MAIN, ELLIS, and CROW, JJ., concur.

[No. 12121. Department Two. May 12, 1915.]

M. H. EGGLESTON *et al.*, Respondents, v. CHARLES B.

SHELDON *et al.*, Appellants.¹

FRAUDULENT CONVEYANCES—EVIDENCE—INDEBTEDNESS. In a suit by judgment creditors to set aside a voluntary conveyance by a judgment debtor, made prior to the rendition of judgment against him, the existence of the debt at the time of the conveyance, as against an innocent grantee, cannot be shown by the introduction in evidence of the pleadings, findings and judgment in the prior case against the judgment debtor, since the recitals therein would not be evidence as against a grantee who was a stranger to the record in such prior action.

Appeal from a judgment of the superior court for Spokane county, Jackson, J., entered February 11, 1914, in favor of the plaintiffs, in an action to subject property to a judgment, tried to the court. Reversed.

Hurn & Hurn and Cannon, Ferris & Swan, for appellants.

Merritt, Oswald & Merritt, for respondents.

FULLERTON, J.—In this action the respondents, who were plaintiffs below, sought to set aside a voluntary conveyance

¹Reported in 148 Pac. 575.

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of an undivided one-half interest in certain real property, made by Charles B. Sheldon to his sister, Lizzie A. Sheldon, and to subject the property to sale under a judgment recovered on December 20, 1912, in an action in which the respondents were plaintiffs and Charles B. Sheldon and one C. E. Horton were defendants.

In their complaint, the respondents alleged that the judgment against Sheldon and Horton was recovered for moneys purloined by Sheldon and Horton from the city treasury of the city of Spokane from time to time between January 1, 1905, and June 20, 1908, aggregating the sum of \$4,374.05, of which sum \$3,559.35 was taken prior to March 10, 1908, the date of the voluntary conveyance from Sheldon to his sister which is sought to be set aside. The complaint contained further allegations intended to show that the real property in question was subject, as the property of Charles B. Sheldon, to the lien of and sale under the judgment obtained against him by the respondents. The defendants answering jointly, admitted the recovery of the judgment set forth in the complaint and the conveyance of the real property from Sheldon to his sister at the time mentioned therein, but denied generally all the other allegations therein, and especially denied that Charles B. Sheldon was indebted to the respondents in any sum for any cause whatsoever at the time the conveyance of the real property was made. On the issue thus joined, a trial was entered upon before the court sitting without a jury. In proof of their allegations, the respondents introduced, over the objections of the appellants, the complaint, the answer, the findings of fact and conclusions of law and the judgment entry in the case of the respondents against Sheldon and Horton, but did not make, or attempt to make, any other proofs concerning the indebtedness of Sheldon to the respondents, or either of them, at the time the conveyance complained of was made other than these documents afforded. Challenges to the sufficiency of the evidence to support a judgment were interposed by the appel-

lants at appropriate times during the trial, all of which were overruled by the trial court, the trial finally resulting in a judgment in accordance with the prayer of the complaint.

The instruments introduced by the respondents, if we are to accept their recitals as primary evidence of the matters contained in them, abundantly support the judgment entered by the court. They tend to show that the respondent Eggleston was treasurer of the city of Spokane between January 1, 1905, and June 1, 1908, and that the other respondent was the surety upon his official bond; that Sheldon and Horton were clerks under Eggleston, and had charge of the collections connected with the water department of the city. That these persons, as collections were made in that department, would enter the several items correctly in the books of the city and correctly tabulate the items on an adding machine, but that they discovered a method by which the adding machine could be manipulated so as to make it total as the sum of the several items a sum less than the actual total, and that they did so manipulate the machine, returning to the treasurer the amount of the manipulated total and keeping and appropriating to their own use the difference between the sum returned and the actual total. The amount appropriated at any particular time was never large when compared with the amount returned, and, because of their belief in the accuracy of the adding machine, the peculations were not discovered by the treasurer, or the finance committee of the city, whose duty it was from time to time to examine and approve the accounts of the several city officers; the thefts being in fact discovered by the state board of accountancy some time after the several individuals interested had been retired from office.

The documents further tended to show the truth of the allegations of the complaint as to the amount taken from the treasury prior to the making of the conveyance which is sought to be set aside. It is well to notice also that these facts appear from the recitals in documents other than the

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judgment proper. The judgment merely recites that the action was tried by the court, that the court had made its findings of fact and conclusions of law therein, and orders and adjudges that the plaintiffs have and recover of and from the defendants a named sum, being the aggregate of the several peculations, with interest, as found by the court, and a certain other fixed sum taxed as costs; it contains no recitals of any nature tending to show the time of the incurrance or the nature of the debt on which it is founded.

The evidence does not disclose, and, indeed, we do not find that it is seriously contended, that the sister of Sheldon had notice or knowledge of her brother's thefts from the city at the time the deed to her was executed, or that she took the deed other than in good faith with the intent to hold the property as her own. Moreover, the testimony shows an obligation on the part of Sheldon to convey the property as he did convey it, although not of such a nature perhaps as would take the transaction from without the rule of voluntary conveyances as against the claims of existing creditors. The question then arises, were these documents—that is to say, the complaint, answer, findings of fact and conclusions of law, and judgment (entered December 20, 1912) in the case wherein the present respondents were plaintiffs and Charles B. Sheldon and C. E. Horton were defendants—competent evidence against the appellant Lizzie A. Sheldon of an indebtedness owing by Charles B. Sheldon to the respondents on March 10, 1908, the date of the conveyance sought to be set aside?

The authorities generally hold that, in an action by a judgment creditor to set aside as fraudulent a conveyance of real property from the judgment debtor to his grantee, the judgment is conclusive evidence between the judgment creditor and the judgment debtor of an indebtedness existing at the date of the judgment, and *prima facie* evidence of the same fact as between the judgment creditor and the grantee of the judgment debtor. Some of the cases also hold that

the record of the cause, made preceding the judgment, may be examined to ascertain as between the judgment creditor and the judgment debtor the time when the obligation arose which gave rise to the judgment. But in so far as the cases have been called to our attention, they hold with practical uniformity that such record, as between the judgment creditor and the grantee of the judgment debtor, is secondary evidence, incompetent, if seasonably objected to, to prove the facts therein recited.

In *Hartman v. Weiland*, 36 Minn. 223, 30 N. W. 815, the plaintiff Andrew Hartman sued Weiland, as sheriff, to recover the value of certain grain alleged to have been taken from his possession by the sheriff under a writ of execution on a judgment in favor of one Nicolin and against one Anton Hartman. The answer set up an indebtedness from Anton Hartman to Nicolin existing at a given date, and alleged further that the grain had been grown on a farm belonging to Anton Hartman, which on the date given, Anton had conveyed, for the purpose of defrauding his creditors, to the plaintiff Andrew Hartman, further alleging that the indebtedness had been reduced to a judgment at a date later than the alleged fraudulent conveyance. At the trial, the sheriff introduced in evidence the judgment roll in the suit of Nicolin against Anton Hartman, the recitals in which showed an indebtedness from Anton Hartman to Nicolin existing prior to the alleged fraudulent conveyance, but tendered no other proofs of the fact. The jury found for the sheriff, a new trial was granted, and the sheriff appealed. The appellate court sustained the order of the trial court, assigning as one of the reasons therefor the following:

"There was no proof that Anton Hartman, the grantor in the conveyance claimed to have been fraudulent, and defendant in the attachment suit, was indebted to the plaintiff in that suit at the time of the conveyance. The judgment in that suit was, as against this plaintiff, who was a stranger to it, evidence only of the fact of its existence. It was no

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evidence, as against him, of the previous existence of the facts on which it was based."

In *Bloom v. Moy*, 43 Minn. 397, 45 N. W. 715, 19 Am. St. 243, speaking to the same question, the court used this language:

"When a judgment creditor, or one claiming through the judgment, brings an action to set aside, as fraudulent as to creditors, a conveyance of real estate by the judgment debtor prior to the judgment, he must show that the debt for which the judgment was rendered existed at the time of the conveyance. The judgment does not, as against strangers to it, prove the antecedent existence of the debt for which it was rendered."

Explaining its holdings in the later case of *Pabst Brewing Co. v. Jensen*, 68 Minn. 293, 71 N. W. 384, the court said:

"It is urged by appellant's counsel that the court erred in finding as a conclusion of law from the facts that the judgment alone was sufficient evidence of Wagner's indebtedness to Pierce as against the plaintiff mortgagee. The rule is well settled that a judgment, *in personam*, at least, of a court of competent jurisdiction, may be offered in evidence in a subsequent suit as evidence of its own existence, and of its legal effects, to prove which it is admissible for and against strangers, as well as for and against parties and privies. Of course, it may be impeached for fraud and collusion, and perhaps on other grounds, but nothing of that character was suggested as to the judgment in question.

"Counsel insist that the law upon this subject is settled in consonance with their views in *Bloom v. Moy*, 43 Minn. 397, 45 N. W. 715, and the cases there cited; but in this counsel are clearly wrong. Those cases are in line with a vast preponderance of the authorities elsewhere to the effect that a judgment creditor suing to set aside, as fraudulent as to creditors, a conveyance by the judgment debtor prior to the judgment, must prove the existence of the debt on which it was rendered at the time of the conveyance, and that, as against the grantee, the judgment does not prove it. Or, putting it in the language used in *Hartman v. Weiland*, 36 Minn. 223, 30 N. W. 815, as against a stranger to it, a

judgment is no evidence of the prior existence of the debt for which it was rendered."

See from the same court: *Braley v. Byrnes*, 20 Minn. 435; *County of Olmsted v. Barber*, 31 Minn. 256, 17 N. W. 473, 944; *Hoerr v. Meihof*, 77 Minn. 228, 79 N. W. 964, 77 Am. St. 674.

Lawson v. Alabama Warehouse Co., 73 Ala. 289, was a bill in equity to set aside a mortgage as having been made for the purpose of hindering, delaying, and defrauding creditors. In the trial of the suit, the complainant introduced in evidence "a transcript from the Circuit Court of Pike county of the record and proceedings" of a suit brought by the complainants against the maker of the alleged fraudulent mortgage, founded upon a promissory note antedating the date of the mortgage and a judgment entered in the action subsequent to that date. On appeal, the court held the judgment record insufficient to show a debt existing prior to the execution of the mortgage, the court saying:

"The statute of frauds avoids gifts or conveyances only as to creditors or purchasers—the only persons whose rights are interfered with, and who can from them sustain legal injury. Between the parties and their privies, they are valid, and have the same operation and effect, as if they were untainted with a covinous intent, and founded on an adequate valuable consideration. Strangers have no right or interest in questioning, and are not permitted to impeach them. The primary fact, of consequence, when a party claiming to be a creditor avers a gift or conveyance, to be in fraud of his rights, is the existence of a debt, to the payment of which the property conveyed could be subjected, if the gift or conveyance did not stand in the way, obstructing legal remedies. The parties claiming under the gift or conveyance may dispute the existence of the debt, may require it to be proved, and may prefer against it any defense, not merely personal, which the debtor could have preferred in an independent suit upon it. . . .

"While, as owner, it is an incident of his power to make such disposition of his property as he may choose, if the limitations the law imposes on the power are not offended, so in

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the creation of debts, in establishing between himself and others the relation of debtor and creditor, the debtor is accountable to no one unless he acts *mala fide*. . . . Therefore, a judgment against the donor, or grantor, whether rendered prior, or subsequent to the gift or conveyance, is competent evidence of the debt, of the fact that the party in whose favor it was rendered, stands in a relation to be injured and affected by the gift or conveyance. When rendered by a court of competent jurisdiction, in the regular course of judicial proceedings, in the absence of fraud or collusion, it is conclusive evidence of a debt existing at the time of its rendition. . . . It is not evidence of an indebtedness existing at any time anterior to its rendition; and if the conveyance is impeached as merely voluntary, as wanting only in a valuable consideration, if the time of rendition is subsequent to the conveyance, there must be other evidence than the judgment affords to show the existence of the debt when the conveyance was made."

In *Yeend v. Weeks*, 104 Ala. 331, 16 South. 165, 53 Am. St. 50, this language was used:

"Where a judgment is rendered by a court of competent jurisdiction in the regular course of judicial proceeding, without fraud or collusion, it is conclusive evidence of the amount and existence of a debt at the time of its rendition, and that, in a proceeding by the plaintiff against the defendant and his grantee, to set aside an alleged fraudulent conveyance, such judgment whether rendered prior or subsequent to the conveyance, is competent evidence of the debt, and that the plaintiff therein stands in a relation to be affected or injured by the conveyance. As was said in *Lawson v. Ala. Warehouse Co.*, 73 Ala. 293, 'It is not evidence of an indebtedness existing at any time anterior to its rendition; and if the conveyance is impeached as *merely voluntary*, as wanting in a valuable consideration, if the time of rendition is subsequent to the conveyance, there must be other evidence than the judgment affords, to show the existence of the debt, when the conveyance was made.'

"If then there is no more proof than the judgment itself—in the absence of fraud or collusion, as we have seen—it is evidence of the existence of a debt at the time of its rendition, and only at that time. This is sufficient to entitle the judg-

ment creditor to impeach the fraudulent conveyance as tainted with actual fraud. In such case, the burden of proving the actual fraud would be upon the complainant. If the complainant, however, would use the judgment to the prejudice of a grantee in a deed alleged to be only voluntary and constructively fraudulent, there must be independent, distinct evidence of facts showing the cause of action which authorized the rendition of the judgment, and that it is older than the conveyance."

Homestead Mining Co. v. Reynolds, 30 Colo. 330, 70 Pac. 422, was an action to have cancelled as fraudulent certain deeds to real property which the plaintiff had sold under execution as the property of the grantor of the defendants. To substantiate his claim, the plaintiff introduced in evidence the judgment and record in the case under which the property was sold. The court on appeal held this insufficient to establish the fact that the plaintiff was a creditor of the grantor at the time of the conveyances. In the course of the opinion, it was said:

"But the case is fatally defective in the entire absence of proof that the plaintiff was a creditor of Wall and Pursel at the time the conveyances were made. The only evidence which plaintiff claims was responsive to that issue consisted in the production of the notes in controversy without establishing their execution, and the judgment and pleadings and records in the case of *Reynolds v. Wall and Pursel* under the judgment in which the sale took place. The defendant mining company was not a party or a privy to that suit, and is not bound by it. The judgment entry is evidence, possibly, that the indebtedness existed at the time of the institution of that action, certainly at the time of the rendition of the judgment. But as against a stranger it is not evidence of an indebtedness anterior to such time. The plaintiff should have gone farther and shown by competent proof the existence at the time of the conveyances of the indebtedness which was merged into the judgment."

In *Arnett v. Coffey*, 1 Colo. App. 34, 27 Pac. 614, Coffey, as plaintiff, brought an action against Arnett and wife to cancel sundry conveyances which apparently vested the title to

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the described property in the wife. The bill set up that Coffey had obtained judgment against Arnett at a date subsequent to the conveyances, but on an indebtedness existing prior to that time. At the trial, the only evidence offered as to the time when the indebtedness put into judgment was incurred was the record in that suit. The decree of the trial court vacated the several conveyances, and directed that the property conveyed be subjected to the payment of Coffey's judgment. The court of appeals reversed the judgment, using this language:

"It is universally agreed, that as against existing creditors, a debtor may not make a voluntary conveyance. To bring the case within this well recognized principle it must be shown by both allegation and proof that the debt to which the property is said to be subject existed at the time of the conveyance, unless there be present an intention to defraud creditors, whose rights are shortly expected to arise, and whose rights may thereafter supervene. *Wilcoxon v. Morgan*, 2 Colo. 473; *Sexton v. Wheaton*, 8 Wheat. 229; *Jackson v. Jackson*, 91 U. S. 122.

"As against Anthony Arnett it is tolerably clear that Coffey's claim did exist prior to the time of the several conveyances which he made. While no evidence whatever was offered upon that subject, other than what may be drawn from the record of the case of *Coffey v. Arnett*, as against him, this seems to be ample for the purpose. In that suit an issue was fairly tendered as to the time and manner in which Arnett acquired the title to Coffey's one-twelfth interest in the lode. From the verdict in that case it must be assumed that Arnett took the title in trust and under an obligation to reconvey when he received the government patent. This obligation existed in 1873, prior to the date of the various conveyances which he made. In cases where the judgment is silent as to the issue upon which it was rendered, it is entirely competent to resort to the pleadings for the purpose of determining what issue was tendered, and which may be said to be conclusively settled by the judgment. *Hinde's Lessee v. Longworth*, 11 Wheat. 199.

"This does not enable the plaintiff to recover. In the absence of any other proof than what is furnished by this judg-

ment and the pleadings the complainant, as against Mrs. Arnett, still remains a subsequent creditor. According to his own allegations the various deeds from Mr. Arnett, and the mesne conveyances which vested the title in Mrs. Arnett all antedated the judgment; and while the pleadings in that suit may, as against Arnett, demonstrate that the plaintiff was a creditor prior to these various transfers, they do not now avail as against the wife who was not a party to the record. When, therefore, it appeared from the plaintiff's own proof that Mrs. Arnett acquired title many years prior to the rendition of judgment, he was bound to show as against her, by competent testimony, that he was a creditor before the date on which she acquired title. *Miller etc. v. Johnson et al.*, 27 Md. 6."

Other cases supporting the rule are: *Springer v. Bigford*, 160 Ill. 495, 43 N. E. 751; *Juilliard & Co. v. May*, 130 Ill. 87, 22 N. E. 477; *Yost Mfg. Co. v. Alton*, 168 Ill. 564, 48 N. E. 175.

The cases of *Jamison v. Bagot*, 106 Mo. 240, 16 S. W. 697; *Goodnow v. Smith*, 97 Mass. 69, and *Hinde's Lessee v. Longworth*, 11 Wheat. 199, have been cited as taking a view contrary to the foregoing cases. But, as we understand them, they do not go to that extent. The case from the supreme court of Missouri clearly does not do so. When the record was offered in that case a general objection to its admission was made, but no specific objection that it was not admissible to prove an indebtedness prior to the rendition of the judgment. The court held that the judgment, being admissible for the purpose of showing an indebtedness at the time of its rendition, the date of the commencement of the action, and that certain facts were alleged to exist, was not subject to the general objection, and the parties could not be heard afterwards to object that it was not admissible for the specific purpose. Passing upon the question, the court said (p. 255):

"But plaintiffs go further in their contention, and claim that these documents not only prove the pendency of the suit, and that certain facts were alleged to exist, but also

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that the facts alleged did exist. These documents were offered as evidence generally. If defendants had made the specific objection that they were not competent to prove the facts alleged in them, it seems that by the generally recognized rule they ought not to have been admitted for that purpose."

In the case from Massachusetts, the opinion in full is as follows:

"The plaintiff claimed the property in question by virtue of a sale from one Risley. The defendant took it by virtue of an attachment on a writ in favor of one Hall, who alleged that he was a creditor of Risley, and that the sale was fraudulent and void as to creditors. The judgment obtained in the action was pertinent evidence tending to prove that Hall was a creditor of Risley, and that therefore the defendant had a right to hold the property attached, and apply it on Hall's execution, if the sale to the plaintiff should appear to be fraudulent. But the plaintiff objects to the admissibility of the evidence in this action, because as to him the judgment was *res inter alios*. But if this objection were valid, it would apply with equal force to any other evidence of transactions between Hall and Risley, and so it would be impossible to prove that Hall was Risley's creditor. It would also apply to the sale by Risley to the plaintiff, which was *res inter alios* as to the defendant and Hall. But, from the necessity of the case, each party must prove his transactions with Risley in order to establish his right to contest the title of the other party to the property. The judge ruled correctly that the judgment was competent to be considered with the other evidence for the purpose of showing a debt due from Risley to Hall at the time of the sale. See *Russ v. Butterfield*, 6 Cush. 242; *Williams v. Babbitt*, 14 Gray 141. Of course, it would be necessary to prove further that the cause of the action existed at the time of the sale, but this does not affect the question before us."

This case, also, we think, militates against, rather than supports, the respondents' position. The court holds, as we interpret it, that the judgment is evidence of an indebtedness from the judgment debtor to the judgment creditor at the time of its rendition, but, because rendered subsequent to the sale sought to be set aside, other evidence was necessary to

show that the cause of action on which it was founded existed at that time.

The case of *Hinde's Lessee v. Longworth*, is more to the point, but even in that case it would seem that the record was held admissible to prove an indebtedness existing prior to the judgment, rather from lack of specific objection than that it was in itself primary evidence of the fact.

The rule announced in the foregoing cases would seem to be sound in principle. A voluntary conveyance of property, made in good faith, is valid as between the parties, and valid as to all persons other than existing creditors of the grantor. Since the grantee of the property acquires an interest therein by reason of the conveyance, such grantee is a necessary and indispensable party to any proceeding brought to subject the property to the debt. As to him it must be alleged, and, if the allegation be denied, it must be proven, that the debt existed at the time of the conveyance. This fact can only be proven by primary evidence; "the best evidence of which the case in its nature is susceptible." The recitals of fact contained in the pleadings, findings and other documents in a cause anterior to a judgment are not primary evidence as against a stranger to the record. However conclusive such findings and recitals may be as against parties and privies to the action, they are but secondary evidence as to strangers. If the facts so recited become material in a proceeding in which they are parties, such facts as to them must be proven from the original sources of evidence, the same sources that were required to establish the facts in the first instance between the parties to the original suit.

So here, since the voluntary conveyance attacked was made in good faith, the grantee in the conveyance, not having been a party to the original action, is not bound by the record therein, and the production of such record does not prove as to her that an indebtedness existed between her grantor and the judgment creditor prior to the entry of the judgment in that action.

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It follows that the judgment must be reversed, and the cause remanded with instructions to enter a judgment for the defendants. It is so ordered.

MAIN, ELLIS, and CROW, JJ., concur.

[No. 12209. Department Two. May 12, 1915.]

C. P. CURTISS, *Appellant*, v. DEAN & CURTISS *et al.*,
Respondents.¹

CORPORATIONS—RECEIVERS—COMPLAINT—SUFFICIENCY. A complaint by a stockholder for the appointment of a receiver for a solvent corporation on the ground of maladministration and mismanagement must allege facts showing maladministration and mismanagement, the general charge of that state of affairs being nothing more than a conclusion.

CORPORATIONS—RECEIVERS—GROUNDS—MISMANAGEMENT—LOSS. A receiver will not be appointed for a solvent corporation, in the absence of a charge of fraud or infringement of the legal rights of minority stockholders, because the business has been conducted at a loss for a period of time prior to the institution of a suit therefor, nor because the minority stockholders believe the policy of the majority in the manner of conducting the business and changing the location thereof is hurtful to the corporate interests.

CORPORATIONS—RECEIVERS—GROUNDS—MISMANAGEMENT—SALARY INCREASE. The fact that the majority stockholders in a solvent corporation raise the salary of the manager, while the business is conducted at a loss, is not a ground for the appointment of a receiver; since, if such increase is illegal, the remedy is an action to restrain its future payment and for the recovery of any illegal salary which has been previously paid.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered June 10, 1914, upon sustaining a demurrer to the complaint, dismissing an action for the appointment of a receiver for a solvent corporation, and for an accounting. Affirmed.

Wm. H. Pratt (*Chas. Bedford*, of counsel), for appellant.
Hayden, Langhorne & Metzger, for respondents.

¹Reported in 148 Pac. 581.

MAIN, J.—This action was brought by the plaintiff seeking the appointment of a receiver for Dean & Curtiss, a solvent corporation.

The vital facts, as stated in the amended complaint, may be epitomized as follows: The plaintiff is a minority stockholder in the corporation. The Dean & Curtiss corporation was organized during the year 1908, with a capital stock of \$12,000. This corporation succeeded a partnership of the same name, which consisted of the plaintiff, C. P. Curtiss, and one Arthur M. Dean, a brother of the defendant Will H. Dean. When the corporation was organized, the shares of stock therein were equally divided between C. P. Curtiss and Arthur M. Dean. Subsequent to the organization of the corporation, Curtiss and Arthur M. Dean each gave to the defendant Will H. Dean 15 shares of stock. Since that time, the latter has become the possessor of all of the stock owned by Arthur M. Dean, and now holds in his own name 63 shares of the stock, in the name of his wife, 10 shares, and in the name of one Belik, a tailor employed by the company, two shares. The plaintiff is the owner of 45 shares. The stock standing in the name of Mrs. Dean and Belik is in reality the property of Will H. Dean. Mrs. Dean and Belik are stockholders in name only.

On or about the 1st day of January, 1911, Will H. Dean secured control of the business of the corporation through his majority holding of stock, and elected himself president and manager, and Mrs. Dean and Belik trustees of the company. Since that time Dean has been conducting the business at a loss. Before that time the business had been making money and paying dividends. The amount of the loss sustained up to the time of the institution of this action was \$5,121.04. It is alleged in the amended complaint that if the business is allowed to continue under its present management, that the plaintiff's investment in the stock will be changed from a dividend paying basis to an entire loss. Notwithstanding the continuing losses for the past three years, Will H. Dean, on

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January 1, 1913, through his own vote and the votes of Mrs. Dean and Belik, increased his salary from \$2,000 a year to \$2,400 a year. This increase was made against the protest of the plaintiff. It is alleged that the increased salary, under the conditions existing, was illegal, and that the plaintiff's stock in the corporation, from an investment worth \$4,500, through the "mismanagement and maladministration of Will H. Dean, has decreased in value until it is now worth not to exceed \$3,000." The present assets of the corporation consist of woollens, furniture, fixtures, and bills receivable, all of which are of the value of \$8,000. The present debts of the corporation are \$2,500. Prior to January 1, 1913, the business of the company had been carried on at 1132 Pacific avenue, in the city of Tacoma, in the building constructed by the plaintiff and Arthur M. Dean, and still owned by them. This building had been constructed so as to be specially adapted to the conduct of the business then carried on by Dean & Curtiss. Will H. Dean, after having obtained control of the business, moved from this location to an inferior location at 1109 A street, against the protest of the plaintiff. The location in the Dean & Curtiss building is one of the most prominent and best located quarters for the business of the corporation in the city of Tacoma.

Prior to the commencement of this action, the plaintiff endeavored to negotiate with Will H. Dean for the settlement of their differences, and for the purpose of putting the company on a paying basis. The plaintiff offered to sell his stock to the defendant Will H. Dean, or purchase the stock held by the latter, but he refused either to sell or to buy, or to fix any price upon his own stock, or to offer any price for the plaintiff's stock. Will H. Dean also refused to make any change in the conduct of the business.

To this amended complaint, a demurrer was interposed and sustained. The plaintiff elected to stand upon his amended complaint and refused to plead further. Thereupon a judgment was entered dismissing the action, from which the plain-

tiff appeals. If the facts stated in the amended complaint constitute a cause of action for the appointment of a receiver for a solvent corporation, then the judgment must be reversed. On the other hand, if the facts stated do not show adequate ground for the appointment of a receiver, the judgment must be affirmed.

As appears from the briefs, a receiver is sought upon two grounds: First, because of the mismanagement and maladministration of the business of the corporation; and second, because of the increase of Dean's salary from \$2,000 to \$2,400 per year. From the facts stated in the amended complaint, if there has been mismanagement of the business or maladministration of the affairs of the corporation, it consists in so conducting the business that it sustained a loss, and in changing the location of the business to a place which is claimed to be inferior. The allegation as to the increase of salary will be separately considered.

I. The amended complaint, it is true, makes the general charge of maladministration and mismanagement. But this is nothing more than a conclusion. The complaint, to state a cause of action for maladministration and mismanagement, must allege facts which show that there has been such maladministration or mismanagement. High, *Receivers* (4th ed.), § 292. The mere fact that the business had been conducted at a loss instead of at a gain for a period of time prior to the institution of the suit, does not furnish a ground for the appointment of a receiver. Neither does the fact that the location of the business was changed. The manner of conducting the business and the location thereof are matters of policy which may be determined by the majority stockholders, or the trustees elected by them. In the absence of a charge of fraud—and the amended complaint does not charge fraud—or infringement of the legal rights of the minority stockholders which cannot be otherwise redressed, a court of equity will not take the control of the business from the majority stockholders and substitute its judgment for

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that of the trustees elected by the stockholders. The power to appoint a receiver for a solvent corporation should be exercised with caution. The court will not interfere merely to settle disputes among stockholders, or to substitute its judgment for that of the majority of the stockholders or the trustees. In *Bergman Clay Mfg. Co. v. Bergman*, 73 Wash. 144, 131 Pac. 485, it is said:

"The power to appoint a receiver is a delicate one, and should always be exercised with caution. [Citing authorities.] This is the first rule confronting a chancellor upon an application, and the second is that a receiver should not be appointed if there is any other adequate remedy. *Secord v. Wheeler Gold Min. Co.*, 53 Wash. 620, 102 Pac. 654; 34 Cyc. 21, 23.

"It has never been the purpose of the law to subject matters of purely private right to the uncontrolled and arbitrary action of the courts. *Hutchinson v. American Palace-Car Co.*, 104 Fed. 182.

"A court will not interfere merely to settle disputes between stockholders, or to substitute its judgment for that of the majority of the trustees. Men differ in their judgment, and the law is that a majority of the stockholders, or in the interim between stockholders' meetings, the trustees, shall manage and control the affairs of the corporation. Some controlling equity must intervene to warrant the interposition of the court."

In *Secord v. Wheeler Gold Min. Co.*, 53 Wash. 620, 102 Pac. 654, speaking upon this question, it was said:

"As stated above, the policy of the corporation, if honestly conducted, must be controlled by the majority of the stockholders. Mistakes, inadvertence, or bad policy, if honestly pursued, will not warrant the appointment of a receiver. Courts will not interfere except in case of fraud or the infringement of legal acts which cannot be otherwise redressed."

The appellant cites a number of cases in support of his claim that the amended complaint shows ground for the appointment of a receiver. The case upon which he seems to place his principal reliance is that of *Boothe v. Summit Coal*

Min. Co., 55 Wash. 167, 104 Pac. 207. But that case is distinguishable from the present. There, the contending interests in the corporation each held the same amount of stock, and there was "no control of the corporation by a board of trustees sustained by the majority of the stock." Here the corporation is controlled by a board of trustees which is sustained by a clear majority of the stock. It was said in the *Boothe* case that the equities of the case "does violence to the elementary idea that a corporation is to be controlled by a governing board representing a majority of the stock." In the opinion in that case it is said that that case is "*sui generis*," which, according to Black's Law Dictionary, means "Of its own kind or class; i. e., the *only one* of its own kind; peculiar." Under the peculiar facts in that case, the cause was resolved according to the law of partnership.

II. The fact that Dean caused his salary to be increased from \$2,000 per year to \$2,400 per year is not sufficient reason to authorize the court to appoint a receiver. If this increase of salary is illegal, upon a proper showing the plaintiff may cause an action to be instituted for the purpose of restraining its future payment, and for the purpose of recovering to the corporation any illegal salary which may have been previously paid. 3 Clark & Marshall, Private Corporations, p. 2062; 2 Thompson, Corporations (2d ed.), § 1763; *Alabama Coal & Coke Co. v. Shackelford*, 137 Ala. 224, 34 South. 833, 97 Am. St. 23; *Schaffhauser v. Arnholt & Schaefer Brewing Co.*, 218 Pa. 298, 67 Atl. 417.

The judgment will be affirmed.

MORRIS, C. J., CROW, ELLIS, and FULLERTON, JJ., concur.

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[No. 12249. Department Two. May 12, 1915.]

E. C. ROHWEDER, *Appellant*, v. STANLEY H. TITUS,
Respondent.¹

BILLS AND NOTES—ACTIONS—QUESTION FOR JURY—HOLDER IN DUE COURSE. In an action on a promissory note, whether plaintiff was a holder in due course is a question for the jury, where his claim depended upon the credibility of his testimony, which was disputed by the circumstances, such as his purchase of the note without inquiry into the solvency of the maker or calling upon him personally, and uncertainty in his testimony as to whether the check given by him to the payee of the note was for the note or some other business transaction.

APPEAL—HARMLESS ERROR—PREJUDICIAL TO RESPONDENT. Error prejudicial to respondent in the admission and exclusion of evidence cannot be taken advantage of by appellant.

SAME—CONDUCT OF TRIAL—ARGUMENT OF COUNSEL. Misconduct of counsel in argument to the jury is not prejudicial error, where the trial court cautions the jury to decide the issues upon the evidence and not upon the statements of counsel.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 5, 1914, upon the verdict of a jury rendered in favor of the defendant, in an action on a promissory note. Affirmed.

Samuel Edelstein, for appellant.

Harry L. Cohn and *Rosenhaupt & Grant*, for respondent.

Crow, J.—Action to recover on a promissory note. From a verdict and judgment in defendant's favor, the plaintiff has appealed.

The controlling questions presented by appellant's assignments of error are whether the trial court erred in overruling his motions for a directed verdict and for a judgment *non obstante*. The note was executed and delivered to the L. D. McCarthy Auto Company, a corporation, by respondent, for \$2,100, on January 2, 1912, and fell due on May 15, 1912.

¹Reported in 148 Pac. 583.

Appellant alleged that he purchased the note for value before maturity, and that he is a holder in due course. Respondent denied these allegations, and for an affirmative defense pleaded payment to the original payee. Upon these pleadings the controlling issues were, (1) whether the appellant was a holder in due course, and (2) whether respondent had paid the note.

Appellant's contention, in effect, is that the undisputed evidence shows him to be a holder in due course. He testified that he purchased the note for \$1,950, on January 18, 1912, and produced his canceled check for that amount and of that date, and in answer to the question whether he gave the check for the note, replied: "I think so." He further testified that he had written respondent a letter on May 2, 1912, advising him of the fact that he held the note, and produced what purported to be a letter press copy. This copy is on a single sheet of paper. No statement was made as to whether it was taken from a letter copybook, or from what source it came.

On cross-examination, appellant admitted, that he was interested in the McCarthy Auto Company; that he was at one time a stockholder, and had represented it as a selling agent, and that he had purchased other notes from it. He stated, that he did not know respondent when he purchased the note; that he made no inquiry relative to him or his financial standing, although he lived in Spokane; that he never went to see him about the note; that he wrote him on one or two occasions; that he received no answers; that he went to the auto company for payments on the note; that he commenced this suit more than one year after the note had matured, and that he did not know respondent at the time of the trial. He admitted a payment of \$200 on the note, which was credited under date of January 18, 1913. This payment he said was turned over to him by the manager of the McCarthy Auto Company, of whom he demanded payment. It appeared in evidence that, prior to the commencement of this action,

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the auto company had gone out of business; that it was insolvent, and that its manager had left for parts unknown. In any event, no one appeared at the trial for or on behalf of the auto company. Appellant further claimed that he left the note with a Spangle bank as collateral security for a debt which he owed. The cashier of the bank testified that, on May 1, 1912, he mailed to respondent a notice that the bank held the note, producing what he testified on his examination in chief was a copy. On his cross-examination, however, he testified that he had made the copy, not at the time it bore date, but from memory, about one month before the trial; that the bank did not own the note; that it did not hold it as collateral security; that appellant simply requested him to hold the note, and that when the bank took a note in the regular course of collection, its custom was to make some notation thereon to agree with a number in the bank. The original note which is before us discloses no such notation, nor has it any mark of identification to show that it was ever in any bank.

Respondent denied that he received any notice from appellant or from the bank; stated that he had paid the note in full to the original payee, part of the payment being made before maturity; that he did not hear of appellant's claim of ownership until long after the note had been paid, or until just a short time prior to the commencement of this action, and that the payee did not surrender the note to him when payment was made, but promised to do so.

It is apparent that to sustain appellant's motion for judgment it would be necessary to find that he purchased the note before maturity, for value, and was a holder in due course. This could be established by his evidence only. The question whether the check was given for the note or for some other business transaction between him and the auto company depended upon the credibility of his evidence. The circumstances under which he admits purchasing the note, without making any inquiry into the solvency of the maker and

without seeing or calling upon him personally, were for the consideration of the jury. He was an interested party and, under repeated holdings of this court, his credibility and the truthfulness of his statements, although undisputed by the evidence of any witness, were for the consideration of the jury. *Coey v. Darknell*, 25 Wash. 518, 65 Pac. 760; *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884; *Gosline v. Dryfoos*, 45 Wash. 396, 88 Pac. 634; *Brown & Bros. Mercantile Co. v. Sherrod*, 53 Wash. 132, 101 Pac. 481; *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801; *Gottstein v. Simmons*, 59 Wash. 178, 109 Pac. 596.

In *Union Inv. Co. v. Rosenzweig*, 79 Wash. 112, 139 Pac. 874, we said:

"In the record before us, as we have said, there is no direct evidence that disputes the appellant's claim that it is a holder of the note in due course. There are, however, circumstances which seemingly dispute the claim, and which to our minds justified the court in submitting the question to the jury."

So, here, there seem to be circumstances surrounding these parties which tend to dispute appellant's claim. The question whether appellant purchased the note for value and before maturity was properly submitted to the jury. The verdict shows that the jurors, who saw appellant, observed his demeanor, and heard him testify, refused to credit his statements, and that they did credit respondent's statements relative to his payment of the note. We have read the entire statement of facts, with the result that we conclude the evidence is of such a character that minds of reasonable men might readily differ upon the issue whether appellant was a holder in due course, and whether respondent paid the note. This being true, the cause was for the jury, and the trial court committed no error in denying the motions for a directed verdict and for judgment *non obstante*.

Appellant has predicated assignments of error upon the admission and exclusion of evidence. We find no error in this regard, unless it was error prejudicial to the respondent,

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of which the appellant cannot complain. Appellant further contends that respondent's counsel was guilty of such misconduct in his argument to the jury as to demand a new trial. We have read the argument of counsel and are unable to find any just cause of complaint. In any event, the trial court cautioned the jury to decide the issues upon the evidence and not upon the statements of counsel.

The judgment is affirmed.

MORRIS, C. J., ELLIS, FULLERTON, and MAIN, JJ., concur.

[No. 12290. Department Two. May 12, 1915.]

MARY BURKE, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

WITNESSES—IMPEACHMENT—FORMER TESTIMONY—EFFECT. In an action to recover damages for personal injuries due to the negligence of the city in permitting a cross-walk on one of its streets to be in a dangerous and unsafe condition, the fact that, in another action by the plaintiff for injuries subsequently suffered through the negligence of a street car company, her testimony as to the extent of her injuries was different from that in the present action, merely affects her credibility, and would not overcome the findings of the trial court in her favor, where there was sufficient evidence as to the unsafe condition of the cross-walk and as to the extent of plaintiff's injuries.

DAMAGES—EXCESSIVE DAMAGES—INJURIES TO ARM AND WRIST. In a personal injury case, where the court finds that plaintiff's body was severely bruised, that she suffered a colles fracture of the right arm, and that there was a permanent injury to her wrist, a judgment for \$900 for the injuries, and their attendant inconvenience, pain and suffering, was not excessive.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered June 23, 1913, upon findings in favor of the plaintiff, in an action for personal injuries sustained in a fall upon a sidewalk, tried to the court. Affirmed.

¹Reported in 148 Pac. 574.

James E. Bradford and Melvin S. Good, for appellant.

Chas. E. McAvoy, for respondent.

MAIN, J.—This action was brought against the defendant city to recover damages for personal injuries alleged to be due to the negligence of the city in permitting a crosswalk to be and remain in a dangerous and unsafe condition. After the issues were framed, the cause was tried to the court without a jury. A judgment was entered in favor of the plaintiff in the sum of \$900. The defendant appeals.

The trial court found: That on and prior to the 17th day of September, 1911, the city of Seattle negligently permitted a cross-walk at the northeast corner of the intersection of Woodlawn avenue and east 70th street to be and remain in a dangerous and unsafe condition; that at this point, the crossing or cross-walk over which pedestrians were required and accustomed to travel was left in an unsafe and unfinished condition, and three boards or planks about two inches by twelve inches by fourteen feet were placed and allowed to remain crosswise upon the cross-walk in a loose, unfastened and uneven condition; that at the intersection of east 70th street and Woodlawn avenue, a telephone or electric light pole was so placed that at night the shadow produced by the pole obstructed the light on the opposite side of the street, and cast upon the planks or obstructions above mentioned a shadow in such a manner that the obstructions could not be observed by pedestrians passing along and over the cross-walk.

That on the 17th day of September, 1911, at the hour of about 9:30 o'clock p. m., while the respondent was walking in an easterly direction along east 70th street on the usual route to her home from the car line on which she usually rode in going to and from the downtown section of the city, at the intersection of Woodlawn avenue and east 70th street, the respondent stumbled and fell over and upon the planks and obstructions above mentioned; that the accident was due

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to the carelessness and negligence of the appellant and was without fault on the part of the respondent; that as the result of the accident, the respondent's body was severely bruised and the bones in her right arm were broken, and she suffered what is known as a colles fracture of the right arm; and that there was a permanent injury to the wrist.

The appellant's brief contains many assignments of error; but in the argument these are all grouped under one general head to the effect that the findings of the trial court are not supported by the evidence. The appellant's principal reliance in seeking to overcome the findings is placed upon the testimony which the respondent gave in an action prior to the trial of this action, wherein she was suing the Puget Sound Traction, Light & Power Company for damages for an injury received subsequent to the injuries here complained of. It is claimed that her testimony in that action, and in the present action, as to the extent of her injuries is in-harmonious. Assuming that, in the action against the Puget Sound Traction, Light & Power Company, the testimony of the respondent as to the extent of her injuries was different from that in the present action, this would go to her credibility. In this case, aside from the respondent's own testimony, there was evidence of the surgeon who reduced the fracture, as to the extent of her injuries. There was also evidence, aside from the evidence of the respondent herself, as to the condition of the cross-walk. In fact, it does not seem to be seriously contended that the city was not negligent.

But the principal claim of the appellant is that the judgment awarded by the trial court is excessive. We think this contention cannot be sustained. A judgment for \$900 for the injuries complained of and their attendant inconvenience, pain, and suffering, is not excessive.

The judgment will be affirmed.

MORRIS, C. J., CROW, ELLIS, and FULLERTON, JJ., concur.

[No. 12292. Department Two. May 12, 1915.]

PACIFIC COAST COAL COMPANY, *Respondent*, v.
JAMES D. ESARY *et al.*, *Appellants*.¹

APPEAL—APPEALABLE ORDERS—ORDER TO ASSESS STOCKHOLDERS. An order of the court in a receivership proceeding, after notice to stockholders and their appearance in court, directing an assessment upon the stockholders and authorizing suit by the receiver in case of non-payment, is appealable as a final order or judgment in a special proceeding, in which the receiver and the stockholders are adverse parties, and are finally concluded by the order.

APPEAL—ABSTRACTS—BRIEFS—TIME OF FILING. An appeal will not be dismissed on the ground that appellants' abstract and brief were not filed within ninety days, as required by Rem. & Bal. Code, § 1730, where the time therefor has been extended by the failure of respondent to return the copy of the statement of facts served upon him; in view of Id., § 394, which provides that the time limited by law for the service and filing of the brief shall be enlarged by any delay in returning such copy to the extent of such delay.

CORPORATIONS—FOREIGN CORPORATIONS—RECEIVERS—JURISDICTION—ASSESSMENT AGAINST STOCKHOLDERS. The courts of one state have no jurisdiction to appoint a general receiver for a foreign corporation, but may appoint a receiver for the assets of the foreign corporation which are within the particular state where the action is brought, and these assets may be subjected to the claims of creditors of the corporation; hence such local or ancillary receivership would be without power to direct an assessment and call upon stockholders for the balance of their unpaid subscriptions to the stock of a foreign corporation.

Appeal from an order of the superior court for King county, Smith, J., entered April 30, 1914, authorizing a receiver to enforce unpaid subscriptions to the stock of an insolvent corporation, after a hearing before the court. Reversed.

Byers & Byers and McBurney & O'Connor, for appellants.
Wm. Brueggerhoff and Elias Wright, for respondent.

¹Reported in 148 Pac. 579.

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MAIN, J.—This is an appeal from an order of the superior court authorizing the receiver of an insolvent corporation to bring suit against the stockholders thereof.

On the 8th day of January, 1913, a receiver was appointed for the Lak-A-Taka Company, a corporation. This corporation had been organized under and by virtue of the laws of the state of Nevada. On April 13, 1914, the receiver filed a motion asking for an order directing an assessment upon the stockholders. After notice had been given as required by law, and in response to the notice, certain of the stockholders appeared in court on the 30th day of April, 1914. At this time the court entered an order directing the receiver, after making a demand upon each stockholder, to bring an action against each and every stockholder that refused to make payment of the whole amount due on their respective stock subscriptions. From this order, certain of the stockholders have appealed.

The respondent opens its brief with a motion to dismiss the appeal. This motion is based upon two grounds. The first is that the order is not appealable. Under the rule stated in the cases of *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113, and *Silvain v. Benson*, 83 Wash. 271, 145 Pac. 175, the stockholders had a right to appeal from the order. A full discussion of this question will be found in the *Bennett* case, and need not be here repeated.

The second ground of the motion is that the appellants' abstract and brief were not served and filed within the time required by the rules of court and the statutes. We find no merit in this branch of the motion. The abstract and three copies of the brief were served upon the respondent at the same time. At the time the brief and abstract were served upon the respondent, the time for serving and filing the appellants' brief had not expired. The failure of the respondent to return the copy of the statement of facts served upon him, enlarges the time allowed by law or rule of court for

service and filing of the appellants' brief. Rem. & Bal. Code, § 394 (P. C. 81 § 695).

Upon the merits, the controlling question is, whether courts in this state have the power to appoint a general receiver for an insolvent foreign corporation. That the Lak-A-Taka Company is a corporation organized under the laws of the state of Nevada is admitted. The rule sustained by the authorities is that the courts of one state have no jurisdiction to appoint a receiver for a corporation organized under the laws of another state, but that a receiver may be appointed for the assets of the foreign corporation which are within the particular state where the action is brought, and these may be subjected to the claims of the creditors. 3 Clark and Marshall, Private Corporations, p. 2756; 5 Thompson, Corporations (2d ed.), § 6332; *Stafford & Co. v. American Mills Co.*, 13 R. I. 310; *Leary v. Columbia River & P. S. Nav. Co.*, 82 Fed. 775; *Sidway v. Missouri Land & Live Stock Co.*, 101 Fed. 481; *Hutchinson v. American Palace-Car Co.*, 104 Fed. 182. This is the statement of the rule as it appears in the text of Clark and Marshall, *supra*:

"A court of equity clearly has no jurisdiction whatever to dissolve a foreign corporation. Nor has it any jurisdiction to appoint a receiver of a foreign corporation, not merely of its assets within the state, but, generally, at the suit either of creditors or of stockholders; or to compel a distribution of assets at the suit of a stockholder."

In the *Hutchinson* case, *supra*, upon this question it is said:

"It is true that every state is entitled to take control, according to its own local rules, of property lying within it, and this independently of the question of domicile, so that, under exceptional circumstances, there is no doubt that a local tribunal may properly constitute a receivership of assets actually within its jurisdiction, independently of any question of domicile. Nevertheless, where the purpose is to wind up a corporation, or a joint-stock association, or a partnership, on account of alleged insolvency or fraudulent

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transactions, or where it is desired to obtain a general receivership, as this expression is commonly understood, initial proceedings should be at the place of domicile, and the other receivership should be ancillary thereto."

No authority has been called to our attention announcing a different rule from the one stated; and an independent investigation has failed to discover any. The receivership in the present case, so far as it extended to the taking possession of the assets of the corporation within this state and subjecting the same to the claims of creditors, was within the jurisdiction of the court. To direct an assessment and call upon stockholders for the balance of their unpaid subscriptions is one of the incidents of a general receivership. But the court had no power to appoint a general receiver for the corporation. If this could be done, the local stockholders might be required to respond to the full amount of the claims before the assets of the corporation in the jurisdiction of its domicile, if it had any, were appropriated to such purpose. In addition to this, the local stockholders would be compelled to respond to the payment of claims, while the stockholders in the state of the organization of the corporation would not be required to meet their proper proportion of such liability.

The proper procedure, as outlined in the authorities in such a case, is to have a general receiver appointed in the state of the corporation's domicile, and an ancillary receivership in any other state where it is desired to require the stockholders residing therein to pay the unpaid balance on their respective stock subscriptions. In this way all the assets of the corporation in both jurisdictions can be subjected to the claims of creditors; and if there be a balance still due, every stockholder can be compelled to respond in his proportionate amount for the purpose of meeting such balance.

The judgment will be reversed, and the cause remanded.

MORRIS, C. J., CROW, ELLIS, and FULLERTON, JJ., concur.

[No. 12442. Department Two. May 12, 1915.]

GLOBE ELECTRIC COMPANY, *Respondent*, v.

J. H. MONTGOMERY *et al.*, *Appellants*.¹

APPEAL—RECORD—CERTIFICATION—AMENDMENT. The fact that the original certificate by the trial judge to the bill of exceptions did not meet the requirements of Rem. & Bal. Code, § 391, would not be ground for dismissal of the appeal, where an amended certificate which satisfies the statute was later filed and, by stipulation of the parties, the clerk of the supreme court was authorized to attach same to the bill of exceptions on file in the supreme court.

APPEAL—HARMLESS ERROR—BILL OF EXCEPTIONS—OMISSIONS. The omission from a bill of exceptions of interrogatories to garnishee defendants prior to trial and their answers thereto could not be assigned as error, where the bill of exceptions did not show that they had been offered in evidence.

APPEAL—RECORD—CERTIFICATE—IMPEACHMENT—REFERENCE. In order to impeach the trial judge's certificate that a bill of exceptions contains all the material facts, the respondent's remedy is to apply to the supreme court for an order of reference to have the question determined.

APPEAL—RECORD—ABSTRACT—SUFFICIENCY. An objection that the testimony set out in an abstract of the record is substantially a copy of that contained in the bill of exceptions without further condensation, is without merit, where in the preparation of the bill, giving the testimony in narrative form, all unnecessary matter was eliminated, and a further condensation would result in an incomplete presentation of the case.

APPEAL—NOTICE OF APPEAL—PARTIES. On appeal from orders in garnishment proceedings in which the principal defendants have no interest, service of notice of appeal on the principal defendants is unnecessary.

FRAUDULENT CONVEYANCES—BULK SALES LAW—PREFERENCE. Where the value of a stock of goods taken by a creditor from a failing debtor is less than the amount due it on open account, the transaction amounts to no more than a preference and not a sale, and such creditor is not liable to garnishment under the sales-in-bulk act (Rem. & Bal. Code, §§ 5296-5300) for failure to require an affidavit and list of creditors.

¹Reported in 148 Pac. 596.

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Appeal from a judgment of the superior court for King county, Frater, J., entered May 23, 1914, upon findings in favor of the plaintiff, in garnishment proceedings. Reversed.

Spence & Denham, for appellants.

Cassius E. Gates, for respondent.

MAIN, J.—This is an appeal by the garnishee defendants from a judgment rendered against them.

The facts, briefly stated, are as follows: From the month of December, 1911, until the month of June, 1913, the principal defendants, under the name of the Edison Electric Company, were engaged in the business of selling electric light fixtures and electric supplies. During this time the Edison Electric Company had become indebted to the plaintiff in the sum of \$909.67. It had also become indebted to the garnishee defendants upon an open account in the sum of approximately \$510.97. This debt to the garnishee defendants was for goods, wares, and merchandise sold and delivered, and used by the principal defendants in their course of business. The garnishee defendants were manufacturers of electric fixtures and dealers in electrical supplies. During the time the principal defendants were engaged in business, the garnishee defendants had furnished them with a line of sample electrical fixtures, with the accessory glassware, sockets, etc. These were placed in the defendants' shop, not for sale, but as samples from which orders could be taken.

The business of the Edison Electric Company not being a successful one, that company was unable to pay its rent, and was notified by the landlord of the premises occupied by it prior to June, 1913, to vacate the same. On that date, upon receiving notice from the landlord, the Edison Electric Company notified the garnishee defendants of this fact, and requested them to remove their samples. Upon receiving this request the samples were removed. At the time of taking back the samples, the garnishee defendants did not request

an affidavit as to the creditors of the defendants, but merely contented themselves with the return of what they considered was their own property. Action was brought by the plaintiffs against the principal defendants as a copartnership, and judgment by default was obtained in the sum of \$909.67. This judgment was entered on February 4, 1914. Prior to the entry of the judgment, a writ of garnishment had been served upon the garnishee defendants. Subsequently this writ was answered by denying the indebtedness. By affidavit the answer was controverted. The trial of the issue thus framed in the garnishment proceedings took place on May 20, 1914, and resulted in a judgment against the garnishee defendants in the sum of \$281.90, this being the value of the samples above referred to as being removed from the shop of the principal defendants after they had notice to vacate. The garnishee defendants appeal.

The respondent opens its brief with a motion to dismiss the appeal. The first ground of this motion is that the bill of exceptions is not properly certified. It may be admitted that the original certificate by the trial judge to the bill of exceptions did not meet the statutory requirements. But subsequently an amended certificate was made, and by stipulation of counsel the clerk of this court was authorized to attach the same to the bill of exceptions. This amended certificate recites that the bill of exceptions contains "All the material facts, matters and proceedings occurring in the trial of said cause not already a part of the record therein." The amended certificate satisfies the statute. Rem. & Bal. Code, § 391 (P. C. 81 § 689).

But it is further argued that it affirmatively appears from the record that the bill of exceptions does not contain all the material facts, since there is not embodied therein written interrogatories which were propounded by the plaintiff and answered by the garnishee defendants prior to the trial. These interrogatories and their answers would have no proper place in the bill of exceptions or statement of facts unless

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they had been offered in evidence. Whether they were offered in evidence or not does not appear from the bill of exceptions. In any event, the trial judge's certificate that the bill of exceptions does contain all of the material facts cannot be impeached in this manner. If the plaintiff was not content with the bill of exceptions as settled by the trial judge, his remedy was to make an application to this court for an order of reference to have the question determined. *Van Lehn v. Morse*, 16 Wash. 219, 47 Pac. 435; *Hallam v. Tillinghast*, 19 Wash. 20, 52 Pac. 329.

The second ground of the motion is that the abstract does not comply with the statute and the rules of this court. The bill of exceptions contains the testimony in narrative form, the reason for this being that there was no reporter present who took the testimony upon the trial in the superior court. The testimony as set out in the abstract is substantially a copy of that contained in the bill of exceptions, and is not further condensed. In preparing the bill of exceptions, apparently all unnecessary matter was eliminated. To further condense the testimony as it appears in the abstract would result in an incomplete presentation of the case. There is no merit in this contention.

The third ground of the motion is that notice of appeal was not served upon the principal defendants. As already stated, the judgment had been obtained against those defendants several months prior to the trial of the cause against the garnishee defendants. The principal defendants were not parties to the garnishment order or judgment. The garnishee defendants alone were interested in the orders made against them. This identical question was presented and decided in the case of *Dittenhoefer v. Coeur d'Alene Clothing Co.*, 4 Wash. 519, 30 Pac. 660, where it was said:

"Nor does there seem to have been any necessity for giving the original judgment defendant notice of the appeal. It was not a party to the garnishment order, decree or judgment, and was not mentioned in it, except by incidental refer-

ence. And the like remark is true of the North Pacific Insurance Company. Each garnishee stands alone, and is not interested in orders made against others."

So far as we are informed, the holding in that case has been at no time overruled or modified. The motion to dismiss the appeal will be denied.

Upon the merits it will be assumed—though we think the fact to be otherwise—that the goods referred to above as samples were, in fact, sold to the Edison Electric Company. Assuming this fact, it then appears that the Edison Electric Company was indebted to the garnishee defendants in the sum of \$510.97, and that the samples removed were of the value of \$291.80. It therefore appears that the value of the goods taken from the shop of the Edison Electric Company by the garnishee defendants was less than the amount of the debt owing upon the open account. This would not constitute a sale within the "bulk sales law." Rem. & Bal. Code, §§ 5296-5300, inclusive (P. C. 203 §§ 9-17). The failure to require an affidavit and list of creditors, as required by the "bulk sales law," would not subject the garnishee defendants to liability. The transaction would amount to nothing more than a preference to one of the creditors. In *Peterson v. Doak*, 43 Wash. 251, 86 Pac. 663, speaking upon this question it was said:

"It is urged by appellant that the sale and transfer of the entire stock by Lucas to respondent, without an affidavit and list of creditors being demanded or given, was absolutely void on account of the 'sales-in-bulk' statute. . . . The stock turned over by Lucas to respondent being insufficient to satisfy the indebtedness to the latter, there was nothing for the respondent to pay over to other creditors. Consequently there would be no occasion for his demanding the affidavit and list of creditors required by the statute. There being no sale or transfer of goods in bulk within the meaning of the 'sales-in-bulk' law, and there being no contention that the sale was otherwise illegal, we find no error in the judgment."

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It is frankly admitted in the respondent's brief that unless that decision is overruled, the judgment in the present case upon the merits must be reversed. We think that decision correctly construes the statute, and we adhere to the views therein expressed. It follows that the judgment must be reversed, and the cause remanded with directions to the superior court to enter a judgment in favor of the garnishee defendants. And it is so ordered.

MORRIS, C. J., CROW, ELLIS, and FULLERTON, JJ., concur.

[No. 12466. Department Two. May 12, 1915.]

CANADIAN COLLIERIES (DUNSMUIR), LIMITED, *Appellant*, v.
OMAR J. HUMPHREY, *Respondent*.¹

~~CORPORATIONS—CONTRACTS—OFFICERS AND AGENTS—NOTICE.~~ Notice to an agent in apparent charge of the general office of a corporation, in the absence of its manager, that the guarantor of payment for coal supplied a vessel would not be personally liable for further supplies furnished the vessel, was sufficient to charge the corporation with such notice.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered June 22, 1914, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

H. D. Folsom, Jr., for appellant.

Herr, Bayley & Wilson, for respondent.

MAIN, J.—The purpose of this action was to recover for coal furnished a certain vessel known as the "Rupert City." This vessel was owned by the Marine Transportation Company, a Canadian corporation. The plaintiff is also a corporation, organized under the laws of Canada. The Rupert City had been chartered to the Alaska Commercial Company,

¹Reported in 148 Pac. 573.

of which corporation the defendant, Humphrey, was the agent. Prior to the time the vessel was chartered by the Alaska Commercial Company, the plaintiff had furnished it coal amounting to the value of \$2,641.65. The plaintiff wrote the defendant asking him to guarantee the payment of the account. Replying to this request, Humphrey, on the 27th day of June, 1912, wrote declining to guarantee the account for coal which had been furnished prior to the time when the vessel was chartered by the Alaska Commercial Company. In this letter, however, he stated that he would "be personally responsible" for any future coal supplied the vessel after it came under his management. Thereafter the vessel was supplied with coal on three occasions. This coal was all paid for by Humphrey, with the exception of that supplied on the 6th day of November, 1912, the amount of which was \$1,006.

On August 30, 1912, the defendant went to the plaintiff's general office in Victoria, B. C., for the purpose of paying a bill for coal. The general manager of the company not being in, the bill, amounting to \$1,932, was paid to one Langton, assistant sales agent of the plaintiff. Humphrey claims that at this time he notified Langton that he would no longer be personally liable under his letter of guarantee written under date of June 27, 1912. The plaintiff claims nothing was said to Langton by Humphrey relative to the latter not being responsible for any future supply of coal to the Rupert City. As to this conversation, the testimony of Humphrey and Langton are in direct and unequivocal conflict. There are circumstances detailed in the record which tend to support Humphrey in his testimony; and there are likewise circumstances which tend to support Langton. The trial court found in favor of the version of the conversation as given by Humphrey. From an attentive consideration of all the evidence, we are not able to say that the finding of the trial court is not sustained by a fair preponderance of the evidence.

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But it is argued that, even if Humphrey did notify Langton that he would no longer guarantee the bills of coal for the Rupert City, this would not be notice to the plaintiff. At the time the conversation is alleged to have occurred, the general manager of the plaintiff was not in its offices. The transaction occurred in the general offices of the company. Langton, at the time, in the absence of the manager, was in apparent charge of these offices. We think that notice to Langton at the time of the payment of the bill mentioned, who was then in apparent charge of the plaintiff's general offices, was sufficient to charge the corporation with such notice. *Livieratos v. Commonwealth Security Co.*, 57 Wash. 376, 106 Pac. 1125; *Brace v. Northern Pac. R. Co.*, 63 Wash. 417, 115 Pac. 841, 38 L. R. A. (N. S.) 1135; *Slocum v. Seattle Taxicab Co.*, 67 Wash. 220, 121 Pac. 67, 39 L. R. A. (N. S.) 435.

The plaintiff cites and relies upon the case of *Moon Bros. Carriage Co. v. Devenish*, 42 Wash. 415, 85 Pac. 17, as sustaining its contention that notice to Langton was not notice to the corporation. That case, however, is distinguishable from the present. There the notice of the dissolution of a partnership was claimed to have been given to a traveling salesman who had no authority over the collection of the account in question. Here, Langton was in apparent charge of the plaintiff's general offices at the time of the transaction, and had authority to receive payment of accounts and receipt for the same. Upon this question this case falls within the rule of the three cases above cited.

The judgment will be affirmed.

MORRIS, C. J., CROW, ELLIS, and FULLERTON, JJ., concur.

[No. 12501. Department Two. May 12, 1915.]

GERMAN AMERICAN BANK OF SEATTLE, *Respondent*, v. A. H. WRIGHT *et al.*, *Appellants*.¹

BILLS AND NOTES—ACTIONS—PLEADING AND PROOF—VARIANCE. In an action to recover upon a bank check, in which the complaint tendered an issue of the unqualified ownership of the check and the answer pleaded that the check was held as collateral only, the quality of plaintiff's possession, as the real issue, was presented by the pleadings, the answer supplying what the complaint lacked; hence evidence sustaining the answer instead of the complaint cannot be urged as a variance amounting to failure of proof, under Rem. & Bal. Code, § 1752, requiring courts to decide cases on their merits, disregarding all technicalities and considering all amendments which could have been made as made.

PLEADINGS—VARIANCE—MATERIALITY. A variance is not material unless it actually misleads the adverse party to his prejudice in maintaining his action or defense on the merits, and the burden is upon him to show such fact.

BILLS AND NOTES—HOLDER IN DUE COURSE—ANTECEDENT DEBT—STATUTE. The holder of a bank check as collateral in part for an antecedent debt, is a "holder in due course" under the negotiable instruments act (Rem. & Bal. Code, §§ 3415-3418) providing that every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, that an antecedent or preexisting debt constitutes value, and that, where a holder has a lien on the instrument he is deemed a holder for value to the extent of his lien.

SAME—HOLDER IN DUE COURSE—STALE CHECK—RIGHTS OF HOLDER—STATUTE. Under Rem. & Bal. Code, § 3576, requiring a check to be presented for payment within a reasonable time or the drawer will be discharged "to the extent of the loss caused by the delay," the taker of a stale check, although not an unqualified holder in due course, would be such holder, except in so far as the drawer of the check could show that he had been injured by the delay.

SAME—HOLDER IN DUE COURSE—EXECUTORY CONTRACT—CONSIDERATION—NOTICE. Knowledge by an indorser of a bank check that it had been given in consideration of an executory contract of the payee would not deprive the indorsee of his character of a *bona fide* holder in due course, where, at the time of the transfer, there had been no failure of consideration through failure of the payee to perform the contract for which the check was given.

¹Reported in 148 Pac. 769.

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SAME—HOLDER IN DUE COURSE—CHECK AS COLLATERAL—BURDEN OF PROOF. In an action on a bank check which had been pledged as collateral security, the burden would not be upon the pledgee as indorsee to show that it was a holder in due course, unless the title of the payee was defective by reason of fraud, duress, or other unlawful means, or because of an illegal consideration.

SAME—HOLDER IN DUE COURSE OF PLEDGED CHECK—EXHAUSTION OF SECURITIES. No principle of suretyship which would require a bank to exhaust other security before enforcing a check is involved in a transaction whereby a check is indorsed to a bank as collateral security for an antecedent debt of the indorser.

SAME—ACTIONS—EVIDENCE—COLLECTION OF CHECK—CUSTOM. The rejection of expert testimony that it was not customary or in keeping with prudent banking to hold a check taken as collateral for a period of twenty days before "sending it through" for collection, was not error, the material thing being injury to the maker, and this was not shown by the evidence.

BILLS AND NOTES—NEGOTIATION OF CHECK—BONA FIDE HOLDER—SECRET AGREEMENT. Where a negotiable check is given without anything indicating it was not to be negotiated, such as post-dating or other device, the maker cannot, after its negotiation by the payee, relieve himself of liability by setting up a secret agreement with the payee whereby the check was not to be cashed or negotiated, except under certain contingencies.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 25, 1914, upon findings in favor of the plaintiff, in an action on a check, tried to the court. Affirmed.

Farrell, Kane & Stratton, for appellants.

Geo. D. Emery, for respondent.

ELLIS, J.—This is an action to recover upon a check drawn by the defendant Wright upon the Lincoln County Bank of Merrill, Wisconsin, payable to the defendant Cavette and by him indorsed to the plaintiff. The facts are these:

On February 21, 1912, Wright, in the city of New York, made his ordinary bank check of that date upon his bank of deposit in Merrill, Wisconsin, to the order of the defendant Cavette for \$5,000, and delivered it to Cavette. At that time Cavette, who was engaged in an effort to reorganize a

certain fisheries company, agreed to deliver to the defendant Wright \$15,000 worth of of the fisheries stock about sixty days from the date of the check. Cavette testified that the check was given on account of this contract and as part payment on the stock; that the reorganization was to be completed about April 1, and the stock was to be delivered about April 21, 1912, and that in case he did not deliver the stock, he was to return the check to the defendant Wright. He also testified, and the fact is not disputed, that at the time of receiving Wright's check he, Cavette, gave to Wright his own check for the same amount, drawn on the plaintiff bank, as security to Wright that Cavette would carry out the contract.

Cavette returned to his home in Seattle about March 1, 1912, and about March 30, solicited a loan of \$700 from the plaintiff bank. He was already indebted to the bank in the sum of \$1,800, and the loan was declined unless he would give security, not only for the \$700, but also for this antecedent indebtedness. He thereupon offered this check as security, promising to repay the whole debt, including the \$700, in twenty days, and requested the bank to hold the check that length of time, agreeing to take it up, together with his note, at the end of that period. The bank officials, knowing that Wright was solvent, and as the cashier testified, believing the check good, loaned Cavette the additional \$700, taking his note therefor, due in twenty days, and extending the time of payment of the former indebtedness of \$1,800 for the same time, Cavette indorsing the check to the bank as collateral for the loan and extension. The transaction was negotiated through the bank's cashier acting for the bank.

Cavette testified that he told the cashier that the check was a contract check and that if he delivered the stock he was to get the money; that he did not go into details, but simply told the cashier that it was a contract check and that he had to deliver the stock to Wright; that he asked the cashier to hold the check for twenty days as collateral to the loan, and

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that he thought he would be able to finish the whole transaction within twenty days; that nothing was said as to what was to become of the check at the end of that time, but that he, Cavette, expected to take up the note and check before that time, and, if he failed to do so, he supposed that the natural proceeding would be for the bank to send the check on for collection. Cavette further testified that at one time Wright had made a deposit in the bank to Cavette's credit, but that it was not to take care of any obligation to the bank. Wright testified that the check was not to be used for any purpose until Cavette delivered the stock to him; that the stock was to be delivered within sixty days, and if not then delivered the check was to be returned. It is admitted that the stock was never delivered.

The bank held the check until April 22, when, the note to which it was held as collateral being unpaid, the plaintiff bank wired the Wisconsin bank on which the check was drawn inquiring whether there were funds there to meet it, and at first received an affirmative reply, but later in the day received a further message that payment on the check had been stopped by Wright. The check was then forwarded for collection, payment was refused, and the check protested. This suit was then brought against Wright as maker and Cavette as indorser of the check, the plaintiff suing as owner. In their answers, both defendants alleged that the check was taken by the bank as collateral security, and this fact, as we have seen, was established by the evidence. The case was tried to the court without a jury. The court found that the bank was a holder in good faith for value and without notice of any equities between Wright and Cavette; that it received the check as collateral to the prior debt and the loan, in the usual course of business. Judgment was rendered for the plaintiff against both of the defendants for the amount of the loan and the antecedent debt, aggregating \$2,500, with interest from the date of presentment, and the protest fees. Both defendants have appealed.

It is claimed (1) that there was such a variance between the pleadings and the proof as to amount to a failure of proof; (2) that the respondent was not a holder in due course and for value, hence was not entitled to recover on the check as against the appellant Wright.

I. The complaint, in effect, alleged that the bank was the unqualified owner of the check. The answer alleged that the check was held by the bank as collateral. The reply alleged that the check was taken on deposit. The appellants contend that the complaint tendered one issue, the reply another, and that the proof sustained neither. Looking to the substance of the thing, there is no merit in this contention. The complaint tendered an issue of unqualified ownership in the bank. The answer pleaded the fact that the bank held the check as collateral only. The evidence sustained the latter view. The pleadings presented as the real issue the quality of the bank's possession. That was the issue which was tried. When we can say with certainty that a definite issue has been presented and tried, we do not indulge nice distinction touching technical variations in the pleadings or between the pleadings and the proof. We proceed, as directed by the statute, to a decision of the case on its merits, disregarding all technicalities and considering all amendments which could have been made as made. Rem. & Bal. Code, § 1752 (P. C. 81 § 1255); *Yeisley v. Smith*, 82 Wash. 693, 144 Pac. 918; *Gaskill v. Northern Assurance Co.*, 73 Wash. 668, 132 Pac. 643; *Kelly v. Lum*, 75 Wash. 135, 134 Pac. 819, 49 L. R. A. (N. S.) 1151; *Bonne v. Security Sav. Society*, 35 Wash. 696, 78 Pac. 38.

A variance to be material must have actually misled the adverse party to his prejudice in maintaining his action or defense on the merits. The burden is upon him to show that he was so misled. The statute so declares. Rem. & Bal. Code, § 299 (P. C. 81 § 287). In this case, it is obvious that the appellants were not misled. Whatever was lacking in the complaint to present the issue tried was supplied by

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their answers. *Butterworth & Sons v. Teale*, 54 Wash. 14, 102 Pac. 768; *Wheatman v. Kane*, 55 Wash. 226, 104 Pac. 258.

II. The second question, as to whether the respondent was a holder for value in due course, is twofold. (a) The appellants claim that respondent was not a holder for value because it held the check as collateral in part to an antecedent debt. Our statute, however, effectually disposes of this question contrary to the appellants' claim. The negotiable instruments act, reference being made to Rem. & Bal. Code, by section numbers, reads:

"§ 3415. Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

"§ 3416. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

"§ 3417. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

"§ 3418. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien."

Clearly the respondent had a lien on the instrument arising from contract, and, as declared by the last section above quoted, it was a holder for value to the extent of that lien. This is the Federal rule, first announced by the supreme court of the United States, speaking through Mr. Justice Story, in *Swift v. Tyson*, 16 Pet. 1, in 1842, and continuously followed by the Federal courts and the courts of many states since. The discussion invited by the appellants, of the relative merits of the Federal rule and the former New York rule as declared by Chancellor Kent in *Bay v. Coddington*, 5 Johns. Ch. 54, would be a purely academic exercise, since the contract of indorsement was made in this state and our statute is con-

trolling as to its effect. The same is true as to the rule in Wisconsin. Moreover, even assuming that the law of either New York or Wisconsin would govern, the law of neither of those states was either pleaded or proved. We would, therefore, assume that the present law of both is the same as our own. As a matter of fact, the present negotiable instruments acts of both those states contain sections identical with our § 3418 above quoted. 2 Revised Statutes, Codes and General Laws of New York (3d ed.), chap. 50, art. 3, par. 53. Wisconsin Statutes (1913), chap. 78, § 1675-53. The supreme court of New York has held that the negotiable instruments act changed the rule laid down in the *Coddington* case so as to include among holders for value holders of negotiable instruments taken merely as collateral security for antecedent debts, modifying the old New York rule "so as to conform to the rule in England and in our Federal court of last resort." *Brewster v. Shrader*, 26 Misc. Rep. 480, 57 N. Y. Supp. 606. We have already declared the same rule in this state, but without expressly basing it on the statute. In *Canadian Bank of Commerce v. Sesnon Co.*, 68 Wash. 434, 123 Pac. 602, we said:

"In this state (and in the absence of a contrary showing we will presume the law of the place of indorsement to be the same) an indorsee of a note taken as collateral security is a holder in due course to the extent of his interests, if the note is taken before maturity and without notice of any existing equities between the maker and the original payee. *Peters v. Gay*, 9 Wash. 383, 37 Pac. 325. But the rights of such a holder are restricted to his interests; the rule being that, where the maker of a negotiable instrument, indorsed as collateral security, has a defense against the original payee of the instrument, the indorsee can in no event enforce payment in excess of the amount which the note is pledged to secure."

See, also, *Farmers' State Bank of Solomon City v. Blevins*, 46 Kan. 536, 26 Pac. 1044; *Second Nat. Bank of Cincinnati v. Hemingray*, 34 Ohio St. 381; *Yellowstone Nat. Bank of*

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Billings v. Gagnon, 19 Mont. 402, 48 Pac. 762, 61 Am. St. 520, 44 L. R. A. 243.

(b) It is next contended that the respondent was not a *bona fide* holder in due course because it took the check about five weeks after it was drawn, and to secure a then created debt of only \$700 in addition to the antecedent debt of \$1,800.

We shall assume, for the purpose of present discussion, that the check had been held by Cavette for an unreasonable time, that is for such length of time when it was taken by the respondent as to put the respondent on inquiry and charge it with notice of the facts then existing. The appellants contend that for that reason the negotiable instruments act, Rem. & Bal. Code, § 3444, makes the respondent not a holder in due course, but charges it with bad faith. That section reads:

“§ 3444. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.”

That section, however, is general and is apparently modified, so far as checks are concerned, by later sections of the same act, relating specifically to checks, which read as follows:

“§ 3575. A check is a bill of exchange drawn on a bank, payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

“§ 3576. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon *to the extent of the loss caused by the delay.*”

The words which we have italicized mark the limits of the rule as applied to checks. It is obvious that while the taker of a stale check is not an unqualified holder in due course, he is such holder except in so far as the drawer of the check is able to show that he has been injured by the delay. The

statute can mean nothing else. This is also in keeping with the rule as it existed under the law merchant. As said by the supreme court of the United States in *Bull v. Bank of Kasson*, 123 U. S. 105:

"Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawee. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time."

The record here is barren of evidence that had the check been presented immediately after it was drawn, Wright, the drawer, would have been in any better position than he now is. No "loss has been caused by the delay." If Cavette had any right to use the check at all, it is obvious that his delay in using it caused Wright no injury or loss.

If we charge respondent with knowledge of everything that its cashier could have learned at the time he took the check it would merely be charged with knowledge that the check was given in connection with an executory contract for the purchase of certain stock to be delivered in sixty days from the date of the check, which time had almost thirty days yet to run before breach by failure to deliver the stock could occur. True, the appellant Wright testified that the understanding was that the check would not be negotiated until the stock was delivered, and Cavette testified that he was to return the check if he failed to deliver the stock, but did not testify that he made any such statement to the bank. The evidence is undisputed that when Wright gave this check to Cavette, Cavette gave Wright his own check on the re-

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spondent bank for the same amount to secure the carrying out of the stock transaction. Wright must have intended something by the delivery of his unqualified check to Cavette. It was not even postdated. It was clearly intended either as a payment on the purchase price, as Cavette testified it was, or as an advancement of Wright's credit to Cavette upon the strength of the executory contract. The fact that there was an exchange of checks between Wright and Cavette can only be explained on the theory that Cavette was to use Wright's check to obtain credit, which he otherwise would have been unable to obtain. Charging the respondent, therefore, with knowledge of the executory contract and that the check was given in connection therewith, is still far from establishing appellants' charge of *mala fides*. The contract to deliver this stock was still executory. It was a valuable consideration for the check whether the check be considered as an actual payment thereon or as an advancement of Wright's credit to Cavette by reason thereof. No failure of consideration had then occurred. As we said in the case of *Moyse v. Bell*, 62 Wash. 584, 114 Pac. 193, touching a similar situation in relation to a note:

"The courts have repeatedly held that knowledge by an endorsee of a note that it had been given in consideration of some executory contract or agreement of the payee, which the payee afterwards fails to perform, will not deprive the endorsee of his character of a *bona fide* holder in due course, unless prior to its assignment to him he had notice of the breach of the executory contract, and that such breach had theretofore occurred."

See, also, the numerous authorities to the same effect there cited and quoted.

At the time that the respondent took this check, Cavette's title thereto was not defective, as defective titles are defined by the negotiable instruments act. (Rem. & Bal. Code, § 8446 (P. C. 357 § 109). Cavette did not obtain the check or Wright's signature thereto by fraud, duress or other un-

lawful means, or for an illegal consideration, nor can we say that his pledging the check to the bank while the contract was still executory was such a breach of faith as amounted to fraud, much less that it would, as a matter of law, charge the bank with notice of fraud. Since, under the evidence, Cavette's title was not defective when he pledged the check, § 3450 of the negotiable instruments act does not impose upon the bank as an indorsee the burden of showing that it was a holder in due course:

"§ 3450. (Every) holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course."

Viewing the whole transaction in the light of all of the evidence and applying the clear provisions of the negotiable instruments act, we are forced to the conclusion that the respondent was a holder of the check for value and in due course and is not chargeable with bad faith in the premises. Having taken the check as security, it is deemed holder for value to the extent of its lien.

We find no merit in the claim that the transaction should be treated as one of suretyship to the extent of the antecedent debt. So far as the abstract of record shows, this point was not raised during the trial. No motion was made to require the bank to exhaust other security which it held as collateral to Cavette's antecedent debt. In any event, we see no room for the application of the principle of suretyship. If the bank had cashed the check it would not have been incumbent upon it to look to the application of the proceeds, nor could Wright have complained. He is certainly in no worse position now than he would have been had the check been cashed.

Nor do we find any merit in the claim that the court erred in rejecting the testimony of an expert witness as to whether

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it was customary or in keeping with prudent banking to hold a check taken as collateral for a period of twenty days before "sending it through" for collection. The material thing was whether the delay resulted in injury to the maker, Rem. & Bal. Code, § 3576 (P. C. 357 § 371). There was no evidence or offer of evidence tending to show that this delay caused Wright any loss whatever.

Finally, and aside from all technical rules of law, it seems to us that the trial court reached the correct result. The appellant Wright gave the appellant Cavette his negotiable check without any indicia whatever that it was not to be negotiated. The check, as we have noted, was not even post-dated. If the check was not to be used, the reasonable thing, and that which would have absolutely protected the bank, would have been not to issue it. To permit an alleged secret agreement between the maker and the payee of a check, to which they have given currency, to defeat the check and relieve the maker from all liability thereon would be to place all of the care and caution touching negotiable paper upon the taker rather than upon the maker, thus reversing not only the theory of the law merchant, and the negotiable instruments act, but also the well known rule of equity that he who makes a loss possible should suffer the loss.

The judgment is affirmed.

MORRIS, C. J., MAIN, CROW, and FULLERTON, JJ., concur.

[No. 12252. Department Two. May 14, 1915.]

NELS CHRISTENSEN *et al.*, *Appellants*, v. FREDERICK A. KOCH
et al., *Respondents*.¹

APPEAL AND ERROR—REVIEW—FINDINGS. The judgment of the trial court based on findings made on conflicting evidence is reversible on appeal, when the supreme court is satisfied that the preponderance of the evidence is against such findings.

VENDOR AND PURCHASER—RESCISSION — FALSE REPRESENTATIONS—RELIANCE ON. Rescission will be granted to a purchaser of lands, located at a distance, who was misled by the vendor's representations, the falsity of which were not readily ascertainable, although he did not avail himself of the vendor's offer to pay the expenses of a trip to inspect the land; since ordinary prudence does not require a person to test the truthfulness of representations made on personal knowledge with the intent that they shall be believed and acted on.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered January 8, 1914, upon findings in favor of the defendants, dismissing an action for rescission, tried to the court. Reversed.

Willett & Oleson, for appellants.

MORRIS, C. J.—Action to rescind an exchange of real estate. Appeal from a judgment of dismissal.

Appellants were the owners of two lots at Everett, upon which there was a small house and a mortgage of \$550. Respondents were the owners of a farm of 160 acres in Adams county, upon which there was a like incumbrance of \$550. An exchange of these properties was arranged; appellants paying in addition \$300 in cash, and giving respondent Frederick A. Koch a note for \$700. Rescission is asked for upon the ground of false representation made by respondent Frederick A. Koch as to the character of the Adams county land. These representations were that the land was good wheat land; that 110 acres had been seeded to wheat in the fall of 1912, and 25 acres to rye; that the land produced

¹Reported in 148 Pac. 585.

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twenty to thirty bushels to the acre; that there was a good four-room house on the ranch, and a barn or shed for horses.

The lower court found that the appellants' Everett property was worth \$1,500; that the Adams county land was worth \$2,000; that respondent Frederick A. Koch substantially represented the character of the Adams county land, and the buildings thereon, and, before the exchange was completed, advised appellant Nels Christensen to make a personal examination of the Adams county land, offering, through himself or agent, to loan him the necessary money for the trip, and that if the land was found to be other than as represented, to pay all expenses of the trip. Based upon this last finding, a conclusion of law was made that appellants were reckless in not availing themselves of the offer. These findings, if supported by the evidence, would support the judgment under the rule so often announced, that findings of the lower court made upon conflicting evidence will not be disturbed, unless from an examination of the record we can say the preponderance of the evidence is against the findings. Having read the record, we have reached the conclusion that the preponderance of the evidence does not sustain the findings, but supports the contention of appellants. This calls for a reversal of the judgment. *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172.

Upon the question of the value of the respective properties, appellants alleged in the complaint that the Everett property was of the value of \$2,500, and upon his examination as a witness, Nels Christensen so testified. Respondent, in the answer, denied the Everett property "was worth the sum of \$2,500, or to exceed \$2,000." Frederick A. Koch testified that the value did not exceed \$1,500. This was the only testimony upon this point. The value should have been found to be \$2,000 under the admission of the pleading. Appellants alleged the Adams county land was worth \$900. Respondents alleged it to be worth \$4,000. The only evidence in the record as to the value of the Adams county land was

from a witness who owned adjoining lands, and was familiar with the property as farming lands. He testified that 30 acres was white clay; 30 acres was covered with scab rock, and that these sixty acres were valueless for farming purposes; that the remainder of the land was worth \$7 per acre. This would make a valuation not to exceed \$1,120, giving the entire 160 acres the same valuation of \$7 per acre. The finding of the lower court was that the Adams county land was not worth the amount paid by appellant, but was worth \$2,000. There is no evidence of a valuation of \$2,000 in the record, nor any evidence of any other valuation except \$7 per acre as stated. Respondent Frederick A. Koch testified that he had been offered a loan of \$1,000, and in making up this finding of value the court recites this fact, and then fixes the value at \$2,000. Assuming that this respondent was offered a loan of \$1,000, such a fact does not evidence that the land was worth \$2,000. Incidentally it might be said that there is a showing by affidavits used in support of a motion for a new trial that this respondent was not offered a loan of \$1,000, but that he endeavored to obtain a loan of \$600 which was denied him, and the largest sum he could procure upon the land was \$550, the sum represented by the mortgage. Giving appellants' land a valuation of \$2,000 as admitted by the answer, and adding \$1,000 as represented by the cash payment and note, we have \$3,000 as the value of the Adams county land as fixed by the trade, so that it is clear, at least to us, that appellants were led to believe that this land was worth at least \$3,000, which means an excess of \$1,880 in value, if we take the only evidence as to value; or, if we accept the court's valuation of \$2,000, appellant paid \$1,000 more than the land was worth.

The land was represented as good wheat land. The evidence shows that approximately 60 acres was untillable, and that this farm was part of a two township section of Adams county that was rated as third class land. It was represented that 100 acres had been seeded to wheat and 25 acres

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to rye. The evidence is that none of the land was plowed, but that respondent had arranged with a neighboring farmer to disk in about 80 acres of wheat, and when told that no crop could be expected from such a planting, respondent Frederick A. Koch replied that he did not care whether he had a crop or not, as he intended to sell the land and wished to be in a position to say it was in wheat. In addition to these 80 acres, about 14 acres had been treated in the same manner during some prior year, upon which a volunteer crop had grown for the past two years. No part of the land had been seeded to rye, but for two years there had been a volunteer crop of rye from some old seeding. Instead of producing twenty or thirty bushels of wheat to the acre, the evidence is that the average crop since 1908 was five or six bushels. Respondent Frederick A. Koch admits that he told appellant that they raised 25 to 40 bushels of wheat to the acre in that county, but says he did not say this particular land would produce such a crop. Accepting his statement as he says he made it, it could have been intended for no other purpose than to induce appellants to believe the land was first-class wheat land and would produce a crop of the character indicated.

We will not go into the evidence further. Enough has been stated to show that the Adams county land was not as represented, and the case falls within the rule of *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102, and the numerous subsequent affirming cases, many of which are collected in *Becker v. Clark*, 83 Wash. 37, 145 Pac. 65. These cases hold that a vendee may rely upon representations of his vendor where the property is at a distance, or where for any reason the falsity of the representation is not readily ascertainable. The lower court evidently gave great weight to respondent's offer to pay the expenses of appellant to Adams county, and in his conclusion charges appellant with recklessness in not availing himself of such offer. Appellant's rights are not to be judged by such

tests. Ordinary prudence does not require a person to test the truthfulness of representations made to him by another as of his own knowledge with the intent that they shall be believed and acted upon, even though the party to whom such representations are made may have an opportunity to ascertain the truth for himself. Such is the law as established by the overwhelming weight of authority, and such is the language of *Woody v. Benton Water Co.*, *supra*. The same rule is laid down in *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186, where we endeavor to point out under what circumstances this rule is applicable, and when the converse of the rule is applicable. In *Jones v. Hawk*, 64 Wash. 171, 116 Pac. 642, a contract for the exchange of real estate was denied specific performance because of false representations as to the character of the land even though the complainant party had visited the land before making the trade. If, as is there said, "the respondent's conduct is not reckless," how can we say in this case that the appellant's conduct was reckless because he did not visit the land. The appellants are entitled to a rescission of the contract and a reconveyance of the Everett lots; the cancellation of the \$700 note if still held by respondent; if in the hands of any third party, the \$700 should be added to the \$300 cash payment, and \$200 representing a mortgage indebtedness placed upon the Everett lots by respondents, and judgment awarded appellants accordingly; the Adams county land to be reconveyed to respondents when they have complied with these conditions.

Reversed and remanded for further proceedings in accordance with this opinion.

CROW, ELLIS, FULLERTON, and MAIN, JJ., concur.

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Statement of Case.

[No. 12256. Department Two. May 14, 1915.]

FIRST NATIONAL BANK, *Respondent*, v. GESKE & COMPANY,
Appellant.¹

FRAUDS, STATUTE OF—PLEADING AS DEFENSE—WAIVER. Where the statute of frauds was not pleaded as a defense nor raised in any other manner on the trial, it was waived, when the complaint fully disclosed the basis of plaintiff's claim.

FRAUDS, STATUTE OF—DELIVERY OF GOODS. Where one lumber company, not having on hand the class of lumber desired by a customer, ordered same from another company and the latter billed the lumber to the first company, but delivered it to the customer, the transaction is equivalent to a delivery to the company ordering the lumber, and hence not within the statute of frauds requiring a signed memorandum of sales of goods except where no delivery is made.

SALES—PARTIES. Where a lumber company ordered a bill of lumber from another company to supply the former's customer, and the lumber was delivered direct to the customer on the customer's assurance that he would "stand good for it," but the bill was made out to the purchasing company, and the customer was, by the seller, merely requested "to protect" it, the transaction shows that the seller regarded the first company as the purchaser and primarily liable for the debt.

FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER. The verbal promise of a purchaser of lumber from the F. Company, made to the J. Company which was supplying the lumber to the F. Company so as to enable the F. Company to fill the order, to the effect that the purchaser would see that it "got its money," or would "stand good for it," is a promise to answer for the debt of another, and void under the statute of frauds, if not in writing.

ASSIGNMENTS—ACTION—DEFENSES—PAYMENT TO ANOTHER. In an assignee's action for the price of lumber sold by the assignor to defendant, it is no defense that defendant had orally promised to protect a third party who had supplied the lumber to plaintiff's assignor, and had paid such third party therefor, where such promise was void under the statute of frauds, and such payment was made after notice of the assignment.

Appeal from a judgment of the superior court for King county, Smith, J., entered June 5, 1914, upon findings in

¹Reported in 148 Pac. 593.

favor of the plaintiff, in an action upon an assigned account, tried to the court. Affirmed.

William Wray, for appellant.

James Kiefer, for respondent.

ELLIS, J.—This is an action by the assignee of a bill for a sale of lumber against the purchaser for the purchase price. Prior to July 26, 1914, the Farrell Lumber Company, a co-partnership, had a contract with the defendant, G. Geske & Company, a corporation, to furnish lumber for the construction of a bridge. On that day a car load of lumber was needed which the Farrell Lumber Company could not furnish at once. It therefore ordered the lumber from the Taylor Mill Company, a corporation, at the purchase price of \$231.30, directing that it be delivered to the defendant. To hasten the matter, one Snyder, president of the defendant, on the same day called upon the Taylor Mill Company and urged the necessity of getting the lumber out promptly. The representatives of the Taylor Mill Company demurred, asking assurance of payment. Snyder replied, in effect, "I will see that you get your money," or "I will stand good for it." It is undisputed that at this time Snyder asked that the lumber be billed to the Farrell Lumber Company because he was buying it from them and wanted the account kept entire, saying, "When I am buying lumber from them (Farrell Lumber Company) I want it all kept together. You send one bill to them and one to me and I will see that you get your money." The salesman and billing clerk of the Taylor Mill Company so testified, and Snyder testified to the same effect and in almost the same terms. The evidence is also undisputed that the Farrell Lumber Company knew nothing of this conversation.

It seems clear that the Taylor Mill Company, at the time it took the order from the Farrell Lumber Company, took it without demurrer and intended to fill it for the Farrell Lumber Company, and actually did so at once, and a little later

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actually billed it to the Farrell Lumber Company, without demurrer and without notice that it claimed to be selling the lumber to Geske & Company direct. The bill or invoice was dated August 4, 1913, and reads: "Sold to Farrell Mill Company for Geske & Co., Renton." Then follows the car number and an itemized description of the lumber with the aggregate selling price, \$231.30. It is unquestioned that the Farrell Lumber Company immediately assigned this account to the plaintiff and received thereon ninety per cent of its face at the time of the assignment. There is no evidence whatever that the plaintiff ever had any knowledge or notice that the Taylor Mill Company claimed that the sale was made to Geske & Company.

There is evidence that, at the time of this sale, the Taylor Mill Company was indebted to the Farrell Lumber Company in a sum equal to or a little more than the amount of this order, and the Farrell Lumber Company credited the Taylor Mill Company with the amount of this order on that account. There is evidence also of subsequent transactions which would have changed this balance, but we regard this as immaterial on the real issue as to whether the transaction here in question is to be regarded as a sale to the Farrell Lumber Company or to Geske & Company.

The court found that the Farrell Lumber Company sold and delivered the lumber to the defendant, Geske & Company, at an agreed price of \$231.30; that immediately thereafter the Farrell Lumber Company, by an assignment in writing, transferred to the plaintiff its account and claim against the defendant for the purchase price of the lumber, in consideration of an advance then made by the plaintiff to the Farrell Lumber Company, and that no part of the money due thereon has been paid. The court concluded, as a matter of law, that the plaintiff is entitled to judgment for the amount mentioned, with interest and costs. Judgment went accordingly, and the defendant has appealed.

The appellant contends that there can be no recovery in this action because the contract price for the lumber was more than fifty dollars and there was no memorandum of the sale in writing signed by the party to be charged, as required by the statute of frauds, Rem. & Bal. Code, § 5290 (P. C. 203 § 5). There is no merit in this contention. The statute of frauds was not pleaded as a defense nor raised in any other manner in the court below, though the complaint fully disclosed the basis of the respondent's claim. Moreover, the lumber was actually delivered, thus bringing the case within the exception made by the statute itself. To avoid this fact, it is argued that there was no competent evidence of the delivery. We shall not discuss the evidence, since the answer admits the delivery of the lumber to the appellant, and the evidence, as we have seen, clearly shows that it was delivered on the order of, and primarily billed to, the Farrell Lumber Company. This was equivalent to a delivery to that company and by it to the appellant.

Nor do we find any merit in the claim that this lumber was sold directly to the appellant by the Taylor Mill Company. The fact that appellant's president, after the order had been made by the Farrell Lumber Company, promised to see that the Taylor Mill Company would get its money did not make the sale a sale direct to the appellant. On the contrary, his statement at the time to the effect that, since he was buying from the Farrell Lumber Company, he wanted it all kept together and directed that a bill be sent to the Farrell Lumber Company, clearly indicates that he then regarded the sale as being made to that company. The fact that the Taylor Mill Company complied with his request and sent the bill according to his direction also shows that the Taylor Mill Company regarded the Farrell Lumber Company as the purchaser and primarily liable for the debt. At the time the duplicate bill was mailed, the Taylor Mill Company wrote Geske & Company:

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"Confirming conversation with your Mr. Snyder recently we ask you to protect us to the amount of \$231.30 on account lumber delivered to Renton for the Farrell Mill Co."

This letter on its face clearly shows that at that time the transaction was not regarded by the Taylor Mill Company as a sale directly to Geske & Company. A remittance was not requested, but merely "We ask you to protect us," thus clearly indicating that the Farrell Lumber Company was the one to whom credit was primarily given.

The fact that the appellant has paid this bill to the Taylor Mill Company is immaterial. Whatever its moral duty in the premises, it was under no legal obligation to do so. Under the evidence here presented, its promise was a mere verbal undertaking to answer for the debt of another. It was not in writing, and hence could not have been enforced. Rem. & Bal. Code, § 5289 (P. C. 203 § 3); *Pressentin v. Hawkeye Timber Co.*, 77 Wash. 388, 137 Pac. 999; *Goldie-Klenert Distributing Co. v. Bothwell*, 67 Wash. 264, 121 Pac. 60, Ann. Cas. 1913 D. 849.

This payment raises no equity in appellant's favor, since its president admitted that he knew the bill had been assigned to the respondent when he made the payment to the Taylor Mill Company and took from that company a bond for protection in making the payment. This evidence was clearly competent as tending to show that the appellant never regarded itself as primarily liable for the debt.

The findings of the trial court were clearly supported by the evidence. The judgment is affirmed.

MORRIS, C. J., MAIN, CROW, and FULLERTON, JJ., concur.

[No. 12264. Department One. May 14, 1915.]

R. L. T. GALBRAITH, *Respondent*, v. A. J. DEVLIN *et al.*,
Appellants.¹

PLEADING—SURPLUSAGE—TRIAL—OPENING STATEMENT OF COUNSEL. The fact that plaintiff's complaint and the opening statement of his counsel overstated his case, would not preclude his right of recovery if there were any facts and any theory upon which he was entitled to recover.

PARTNERSHIP—EXISTENCE OF RELATION—SHARING EXPENSES. Where parties entered into a joint venture, upon the understanding that each should pay an equal amount of all the expenses incident to the venture, the conclusion necessarily follows that they would share equally in all the proceeds of the enterprise as partners.

PARTNERSHIP—GOOD FAITH BETWEEN PARTNERS. Where partners in a group of coal mining claims procured an option on the interest of another partner by falsely representing that they could make a sale at a certain price, concealing from him the situation of affairs probably insuring the realization of a better price for which the sale was in fact made, it is such a fraud as against the partner giving the option as to entitle him to recover his proportionate share of the purchase price which he had not received.

EQUITY—CLEAN HANDS—DIFFERENT TRANSACTIONS. There is no foundation for the contention that plaintiff had not come into court with clean hands, when he sought to enforce his equities against the fraud of his partners, on account of misrepresentations made by him to an attorney who was to have an interest in the partnership claims in consideration of services, when the attorney was not in court complaining of plaintiff, and, in fact, had been satisfied to accept a settlement on the basis of representations made to him by other members of the partnership.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 29, 1914, upon findings in favor of the plaintiff, in an action for equitable relief, tried to the court. Affirmed.

Robertson & Miller, Post, Avery & Higgins, and John P. Gray, for appellants.

Cannon, Ferris & Swan, for respondent.

¹Reported in 148 Pac. 589.

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HOLCOMB, J.—By this appeal we are called upon to review a judgment in equity, in an action by respondent against appellants to recover one-fifth of the stock of the Corbin Coal & Coke Company which stands of record in the name of the appellants, and one-fifth of a certain sum of money received by appellants in addition to that which was paid to respondent for the sale of seventeen coal claims, known as the Langley group, located in the Flathead country, in the Kootenai district, British Columbia. A decree was granted respondent as prayed for.

The material and substantial allegations of the respondent's complaint, and which he produced evidence tending to support, were briefly as follows: It is alleged that the appellants and the respondent and William J. Langley and Judson B. Langley were partners in the ownership of possessory rights to fourteen coal claims in the province of British Columbia; that adjoining these claims were three others, located by George M. Judd, James D. Gordon and A. W. Vowell, who were friends and acquaintances of respondent and the Langleys, and that Judd, Gordon and Vowell were not members of the partnership, and the partnership had no interest in their claims. It is alleged, also, that one J. A. Harvey, an attorney, was employed to do the legal business for the partners, and it was agreed that he should be secured by an interest in the claims.

The representations of fraud are contained in the seventh paragraph of the complaint. It is therein alleged that, in December, 1904, the partners gave an option to Phillips & McClain to sell said coal claims for approximately \$450,000, and, at the time of the doing of the matters and things hereinafter complained of, Phillips & McClain held the option; that, in June, 1905, appellants learned that one D. C. Corbin was in search of coal property in said district, and entered into a fraudulent scheme and plan of gaining possession of the property for the purpose of disposing thereof to Corbin, but concealed their plans and purposes, and in order to carry

out their purpose, refused to renew their option to Phillips & McClain, which was then about to expire, and did expire early in July, 1905; and they thereafter represented to respondent, appellant Devlin being spokesman, that D. C. Corbin would purchase the property for the sum of \$75,000 in cash, that it would take approximately \$12,500 to secure the interests of Judd, Gordon and Vowell, and to pay Harvey for his services, and that there would remain \$12,500 for each of the partners; that Corbin would not allow the respondent or any of the partners to retain any interest in the property, and that the appellants advised the acceptance of that sum; and further requested the respondent to execute to Page an option with reference to the transfer of the interest of the respondent to Page, stating that this was necessary for the reason that the leases from the government to certain of said property stood in the name of the respondent and his sister-in-law; and further that Devlin stated that he and Page had agreed to take \$12,500 each, that each of the Langleys had agreed to take the same sum, and that said offer was the best that could be secured; that the respondent finally agreed to, and did, execute the option to Page for the purpose of transferring the interest which respondent appeared to have, and did have, in the property to the purchaser, and thereafter executed such assignments and other documents as were requested in order to enable Page to convey the title to the property; that the other persons in whose names the claims stood, either themselves or by attorney in fact, executed options, and thereafter such other papers as were necessary.

It is alleged that, on or about October 8, 1905, respondent received the money named in the option, to wit, \$12,500, and that on April 15, 1912, respondent was informed by William J. Langley that D. C. Corbin paid for the possessory rights to the seventeen coal claims the sum of \$100,000, and formed a company called "Corbin Coal & Coke Company," to take title to the claims, and delivered to these appellants

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one-tenth of the capital stock thereof, without any other consideration and in pursuance of the original agreement made with Corbin, and that the deal with Corbin was concealed from the respondent by the appellants, and respondent had no knowledge thereof until thus informed by Langley.

The answer denies the allegations of the complaint relating to the charge of fraudulent misrepresentations or concealment and the allegation as to partnership. It admits that, in July, 1905, appellant Page obtained several options or contracts for the purchase by him of seventeen coal claims, one from each owner thereof, and admits that he sold the coal claims to D. C. Corbin for \$100,000, and that a part of the consideration was the promise of Corbin that he would form a corporation to take title to said property and would cause to be delivered to the appellants one-tenth of the coal stock thereof; it being agreed, however, at the time, that the appellants should take charge of the property between the time of the sale and the formation of the corporation, and superintend the development and advance moneys therefor, without making any charge for any services to be rendered, and when it should be decided to build a railroad to said property, which was absolutely necessary to make the same of any value, that the appellants should advance their *pro rata* share of all expenses; that the corporation was formed in the year 1909, and said stock was delivered to appellants, was placed of record in their names on the books of the corporation, and has ever since so stood in their names; and that appellants advanced about \$7,000 for the development of the mining claims before the formation of the corporation, and advanced for the building of the railroad the sum of \$47,000.

The answer also alleges that, in July, 1905, appellant Page obtained from the respondent a written option for the purchase of the coal claims of himself and of his sister-in-law, for the sum of \$12,500, which, in the condition the claims then stood, was as much as the market value thereof; that

he exercised his right under said option and in October, 1905, paid the consideration therefor, and obtained a conveyance from respondent in accordance with the terms of the option; that he sold the coal claims to Corbin under the agreement heretofore mentioned; that the stock was placed in the names of the appellants, and no attempt ever made to conceal their interest. There are also some allegations as to a conspiracy between respondent and the two Langleys for the purpose of recovering a portion of the profits which the appellants had received from the sale of the coal claims, and also an allegation that the respondent did not come into court with clean hands, had not offered to do equity, had been guilty of laches, and that his claim was barred by the statute of limitations and the statute of frauds.

There is a further contention by appellants, upon the opening statement of counsel, that the respondent's charge in theory, as set forth in the complaint and the opening statement of his counsel, had not been sustained, in that it was stated by counsel in his opening that the appellants had tentatively arranged with Mr. Corbin to sell the property to him for a consideration of \$100,000 and one-tenth of the stock of the corporation to be formed, and that the appellants had misrepresented the arrangement to the respondent and the two Langleys, and as a result of such misrepresentation had obtained from the parties written options running to the appellant Page, which were in fact not options, but merely powers of attorney authorizing conveyances to Corbin. As to this, the court found that, at the time of the giving of the options, there had not been any arrangement or understanding with Mr. Corbin in respect to these claims, and he had not seen the same or negotiated for the same, and did not at the time have any interest, direct or indirect, in the securing of the options; that the negotiations with Corbin in respect to the property were made after July 31, 1905, and were carried on for some time thereafter, and not completed until in October, 1905; that the representations to secure

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the options were made, if at all, on July 21, 1905. It may be that respondent's counsel in his opening statement overstated his case. It may even be that the representations contained in the complaint overstated the case. That often occurs in the practice. But in neither case does it necessarily follow that the party should be denied the right of recovery if there are any facts and any theory upon which he is entitled to recover.

I. The principal proposition necessary to be first established in order that respondent might be entitled to recover was that of partnership. The allegation of partnership between these parties was denied by appellants. The evidence, however, is abundant and thoroughly establishes that they were partners; that is, that they entered into a joint venture, and understood and acted upon the understanding that each of the parties should pay an equal amount, to wit, one-fifth of all the expenses incident to the venture; and the conclusion would necessarily follow that they would share equally in all the proceeds of the enterprise. The status of the parties being thus fixed, the law applying is, of course, well settled. Any one of the partners would have the right to purchase the interest of any of the other partners and acquire the same for himself. If it fortunately occurred that he was able to sell at a considerable profit very shortly, without any previous arrangement having been made therefor, his selling partners would have no right to complain. There is a case entitled *Dunne v. English*, 18 Eng. Eq. 524, cited in Lindley on Partnership (2d Am. ed.), p. 712, as follows:

"The plaintiff and the defendant had agreed to buy a mine for £50,000, with a view to resell it at a profit. It was ultimately arranged that the defendant should sell it to certain persons for £60,000, and that the profit of £10,000 should be equally divided between the plaintiff and the defendant. The defendant, however, in fact sold the mine for much more than £60,000, to a company in which he himself had a large interest. The plaintiff was held entitled to one-half of the whole profit made by the resale."

The author then continues:

"There was in this case some evidence that the plaintiff knew that the defendant had some interest in the purchase beyond his share of the known profit of £10,000; but the plaintiff did not know what that interest was, and the real truth was concealed from him. It was held that the defendant being the plaintiff's partner, and expressly intrusted with the conduct of the sale, was bound fully to disclose the real facts to the plaintiff, and not having done so, could not exclude him from his share of the profits which the defendant realized by the sale."

Story, Partnership (7th ed.), § 172, states the rule concerning the relation of partners to each other as follows:

"Good faith not only requires that every partner should not make any false representation to his partners, but also that he should abstain from all concealments which may be injurious to the partnership business. If, therefore, any partner is guilty of any such concealment, and derives a private benefit therefrom, he will be compelled in equity to account therefor to the partnership. Upon the like ground, where one partner, who exclusively superintended the accounts of the concern, had agreed to purchase the share of his copartners in the business for a sum which he knew, from the accounts in his possession, but which he concealed from them, to be for an inadequate consideration, the bargain was set aside in equity, as a constructive fraud, for he could not in fairness deal with the other partners for their share of the profits of the concern without putting them in possession of all the information which he himself had with respect to the state of the accounts and the value of the concern."

These principles are sustained in substance by all the text writers and by the courts, with great unanimity. They were applied by this court in *Finn v. Young*, 46 Wash. 74, 89 Pac. 400; *Id.*, 50 Wash. 543, 97 Pac. 741; *Causten v. Barnette*, 49 Wash. 659, 96 Pac. 225, and *Salhinger v. Salhinger*, 56 Wash. 134, 105 Pac. 236.

II. Such being the established status of the parties, the question arises whether or not there was any violation of the duty of the appellants to fully disclose to the respondent all

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the information in their possession. The appellants' position seems to be that, notwithstanding these well known and well settled principles of law concerning the rights and relations of partners as such and toward each other, there was no deceit practiced upon the respondent by the appellants; that they simply procured his option for the sale of his claim for the smallest sum they could procure it, and thereafter sold it for as large a sum as they could secure. It is true that the person to whom they sold, a Mr. Roberts, stated that he had no previous arrangement with appellants to buy the property, or pay a certain price for it, or buy it for Mr. Corbin, prior to July 21, 1905. The evidence, however, is that Roberts was a railroad and mining engineer and mine manager, and was at the time constructing a railroad for Mr. Corbin, running from Spokane to somewhere in the direction of these coal locations; that Mr. Roberts and Mr. Corbin had previously been associated together in the building of a railroad, and Mr. Roberts was known to be one in whom Mr. Corbin placed great reliance; that Mr. Roberts had, a short time before the option was secured, been in that locality looking at a group of coal claims called the McInnes group; that when this was discovered, the appellants sought to interest Roberts in their group, claiming that their group was a better one than the McInnes group; and they undoubtedly believed that Mr. Roberts was acting for the benefit of Mr. Corbin. There is evidence that on July 21, 1905, Devlin went to respondent to secure his option; that W. J. Langley was with Devlin; that Devlin told respondent they thought they had sold the mine to Mr. Corbin, and that the price to be received was \$75,000. There was no particular need, if no price had been agreed upon at all, for them to mention any price to Mr. Galbraith. If no price had been agreed upon, the statement that \$75,000 was to be paid was itself false. If they were to receive but \$75,000, and it being established that Galbraith was a partner owning a one-fifth interest in the group, then of course Galbraith's interest in the

proceeds would be \$12,500. It was upon these representations he testified that he agreed that he would take \$12,500, and executed his option therefor, the option running to Page.

While the appellants deny that these statements were made to the respondent at that time or at all, the trial court evidently believed the statements of Galbraith and W. J. Langley, and though there may be a greater number of witnesses testifying to the contrary, while the trial court had the opportunity and advantage of having the witnesses before him and of being able to judge of their credibility by their actions and demeanor as well as by their testimony, we have nothing by which we can determine that Galbraith and Langley should not be believed and that the other witnesses should be believed. In other words, upon that question of fact we cannot determine that the evidence positively preponderates against the findings of the court. If, then, these two propositions are established, (1) that there was a partnership existing between the parties, and (2) that the appellants misrepresented and concealed the conditions existing at the time they secured the option from the respondent, it would seem clear that the respondent was entitled to recover any part of his share of the purchase price of the property which he had not received.

III. The appellants urge further that the respondent did not come into court with clean hands, and therefore is entitled to no equity in the premises. This contention seems to be based upon the fact that the respondent himself caused some misrepresentation to be made to James A. Harvey, the attorney who represented the partnership in perfecting the title to the coal claims and who had been given an interest in the claims therefor. One trouble with this contention is that Harvey is not here complaining of the act of the respondent, and another answer to it is that Harvey himself testified that Devlin and, he thinks, William J. Langley came to him and represented to him that they were getting a much less price than they had anticipated getting, and that while \$5,000

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would not represent one-eighth of what they were getting, they thought Harvey should take that sum inasmuch as they had a lot of other expenses outside; and that he therefore concluded to take the \$5,000 in settlement of his interest. If Harvey was satisfied, no one else can complain for him.

We cannot say that the evidence does not preponderate in favor of the court's findings. Such being the case, the conclusions of law and decree naturally followed. The decree is therefore affirmed.

MORRIS, C. J., CHADWICK, PARKER, and MOUNT, JJ.,
concur.

[No. 12330. Department Two. May 14, 1915.]

CATHERINE S. TAIT, *Appellant*, v. KING COUNTY,
Respondent.¹

HIGHWAYS—DUTY TO REPAIR—ACCEPTANCE OF PLAT. Under Rem. & Bal. Code, § 8787, requiring the county auditor to keep a record of all plats which if situated outside of any incorporated town or village must first be approved by the board of county commissioners, and under Id., § 5575, giving the board general supervision over county roads in the county, and imposing the duty to open roads necessary for public convenience, the approval and filing of a plat does not cast upon the county the duty of keeping open every highway dedicated by the plat; but before such duty devolves upon the county, it must have invited the public to use such highway.

HIGHWAYS—EXISTENCE—DUTY TO REPAIR. The fact that a roadway, dedication of which has been accepted by the county, may have been constructed by a private individual, would not necessarily absolve the county from any duty to keep it in reasonable repair.

HIGHWAYS—EXISTENCE—EVIDENCE—QUESTION FOR JURY. In an action against a county for personal injuries suffered by reason of a defective highway dedicated in a plat, whether or not the county had impliedly invited the public to use the highway is a question for the jury, where it appeared that the county commissioners approved the plat and it was filed in the office of the county auditor, that thereafter the owner of the tract continued for a period of four or five months to grade the streets, presumably with the permission,

¹Reported in 148 Pac. 586.

express or implied, of the county commissioners, who had actual knowledge that the highway had been graded, promised to send out the road supervisor to look over the matter of repairs, and granted a franchise to put water mains in all the streets of the plat.

HIGHWAYS—ACTIONS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. Plaintiff cannot be charged with contributory negligence, as a matter of law, from the fact that she had knowledge of the hole in the highway into which she fell in the nighttime, where it appears that plaintiff had no knowledge of an undermined ledge around the hole, which gave way when she was close to the hole, while proceeding carefully on the lookout for it, previous knowledge of the defect being only a fact or circumstance bearing upon the question of contributory negligence, to be submitted to the jury along with all the facts and circumstances surrounding the accident.

Appeal from a judgment of the superior court for King county, Smith, J., entered April 18, 1914, upon granting a nonsuit, dismissing an action for personal injuries sustained by a pedestrian through a defective highway. Reversed.

Shorett, McLaren & Shorett, for appellant.

John F. Murphy and *S. H. Steele*, for respondent.

MAIN, J.—The purpose of this action was to recover damages for personal injuries alleged to be due to the negligence of the defendant in failing to keep one of its highways in proper repair. The defendant answered the complaint by certain admissions and denials, and pleaded affirmatively that the place where the accident occurred was not in a street or highway which the county was under obligations to maintain or keep in repair; and that the plaintiff's contributory negligence was the cause of the injury. The affirmative matter in the answer was denied by reply. The cause in due time came on for trial before the court and a jury. At the conclusion of the plaintiff's case in chief, the defendant interposed a motion for a nonsuit, which was granted. Motion for a new trial being made and overruled, a judgment was entered dismissing the action. The plaintiff appeals.

The facts, briefly stated, are these: On September 12, 1907, the Sound Trustee Company, the then owner of a cer-

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tain tract of land bordering on the east side of Puget Sound, presented to the county commissioners a plat designated as Redondo Beach, Division No. 1. The county commissioners approved the plat, and on September 13, 1907, it was filed in the county auditor's office for King county. The purpose of platting the property was to enable the owner to sell the same as lots and blocks. Upon the plat certain streets and avenues are designated. These are dedicated to the use of the public as highways. In front of this tract of land as platted there is a dock. Upon or near the dock there is a post office and one or two stores. The post office is known as Redondo. The tract of land referred to as platted is near the south boundary line of King county, fronting, as already stated, on Puget Sound from the east.

Along the front of the plat is a street, indicated as Beach Drive. The length of this street is approximately 2,000 feet. It extends from a point a short distance north of the dock, south along the shore just above what is known as the beach. The south end of this drive does not connect with any other street or highway. It ends in what is called by some of the witnesses as a "dead end" or "nowhere." The owner of the property as platted graded Beach Drive and a street at the rear of the plat, and certain streets extending into the plat from these two streets. On Beach Drive a roadway was graded twelve or fifteen feet wide the entire length of the street. The east side of this graded roadway was near the property line on that side of the street. In grading the roadway, the bank was cut down in order to make a level surface for traffic. The surface of the lots adjacent to the street upon the upper side was six or eight feet in places above the level of the street. The grading of the streets mentioned was begun by the owner in June, prior to the presentation of the plat to the board of county commissioners for its approval, and was continued until the month of February, 1913, when the work seems to have been completed.

After the grading of Beach Drive was completed, that street was used generally by the people in that vicinity for the purpose of reaching the dock, post office and store. It was used not only as a footway, but for wagons and other vehicles. The children of the community in going to and from school passed over it.

To the south of Redondo, at a distance of approximately one-half or three-quarters of a mile, was a settlement known as Buenna, but at this place there was no post office. The people from this settlement also used Beach Drive in going to and from Redondo. In order to reach Beach Drive, they came over a roadway across private property.

The use of Beach Drive in the manner mentioned was continued from the time it was opened until the 31st day of December, 1912. On this day there was an extreme high tide at this point on the Sound, and a severe storm, which washed away certain portions of the roadway of Beach Drive. Thereafter vehicles could not pass along the street, but it was used by the people of the vicinity when walking to and from Redondo. Along the roadway there were places where it had been washed away, except a strip of two or three feet on the east side thereof adjacent to the bank mentioned.

On July 30, 1913, the plaintiff and her married daughter left their home, which was about a quarter of a mile south of Redondo and on Beach Drive, for the purpose of going to the post office and store. They traversed the roadway as usual. They left the store to return home at about 9 o'clock that evening. It was then dark. They traveled along the footpath on the east side of the roadway. The daughter preceded the mother, having, as both the mother and daughter testified, the difficulties of the road in mind, and a desire to avoid them. The point where the roadway was most nearly washed away was in front of a tent erected upon an adjacent lot. This fact was known to the appellant and her daughter. The washout at this place was somewhat "V" shaped, across the apex of which, or near the lot line, was placed a plank

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for the purpose of walking over. From the evidence of the appellant and her daughter it appears that it was so dark that they could not see the street or the holes therein, and they had in a way to feel their way along. When the daughter reached the point where she thought she was near the "bad" place, as she termed it, she stopped and said to her mother that she thought they were "very close to it." The mother stepped up by her daughter's side, when the earth under the latter's feet gave way, and she was precipitated into the washout a distance of six or eight feet. The appellant did not step into the hole, but the dirt under her feet as she stood near its edge gave way, because the surface of the street was not washed away to the same extent as the soil beneath. One of the witnesses described it as "the lower ground was more soft and washed out in under in places and this old roadway hung out some or shelved over."

At the time the plat was approved by the county commissioners, there were about three families living at Redondo; at the time of the trial there were approximately twelve. This action was brought, as already stated, for the purpose of recovering for injuries which the appellants claimed to have sustained by reason of the fall mentioned. Redondo, or Redondo Beach, was an unincorporated village.

The first question is whether Beach Drive had become a highway in such a sense that the respondent county was under the duty of keeping it in repair. Rem. & Bal. Code, § 8787 (P. C. 115 § 147), imposes upon the county auditor the duty of keeping a record of all plats, and where platted property is not situated within any incorporated town or village, before such plat can be filed in his office, it must be approved by the board of county commissioners of the county. By Rem. & Bal. Code, § 5575 (P. C. 441 § 117), the board of county commissioners have general supervision over the roads in the county, and a duty is imposed upon such board of opening for traffic such roads as are necessary for public convenience. The fact that the board of county commis-

sioners approves a proposed plat as a prerequisite to its being filed and recorded in the county auditor's office, does not cast upon the county the duty of keeping every street or avenue dedicated by the plat to the public use open for traffic. *Ottolengui v. Seattle*, 59 Wash. 37, 109 Pac. 206. Before a duty devolves upon a county to use reasonable care to keep a highway in reasonably safe condition for travel, it must have, either expressly or impliedly, invited the public to use such highway. *Taake v. Seattle*, 16 Wash. 90, 47 Pac. 220; *Lautenschlager v. Seattle*, 77 Wash. 12, 137 Pac. 323. Had the board of county commissioners caused Beach Drive to be graded as it was, under the section of the code above referred to, which makes it the duty of such board to open such highways as are necessary for public convenience, it would hardly be claimed that the county was not under obligations to exercise reasonable care to keep the street in a reasonably safe condition. But from the facts above stated, it appears that the street in question was not graded by the county, but by the platter. The fact that the roadway may have been constructed by a private individual does not necessarily absolve the county from any duty to keep it in reasonable repair. *McKnight v. Seattle*, 39 Wash. 516, 81 Pac. 998.

The ultimate question is whether the board of county commissioners, in permitting the street to be graded by a private party, did not thereby impliedly invite the public to use the same. It can hardly be said that the commissioners are not presumed to know the local conditions of the property platted at the time of approving the plat. After the plat was approved by them, the streets and avenues therein dedicated to public use became highways in a certain sense. Some of the authorities speak of such streets as "paper" streets. After the approval of the plat, the streets and avenues therein designated came under the jurisdiction of the board of county commissioners. Whether they would be improved or not depended upon the action of that board. The fact that the

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board of county commissioners, with knowledge express or implied, permitted the platter of the property to continue to grade the streets therein for a period of four or five months after the plat had been accepted would seem to imply an invitation to the public to use such streets when the grading was completed. The board of county commissioners had actual knowledge that Beach Drive had been graded, not later than January 15, 1918, because on this date certain persons living in the vicinity appeared before the board and advised the members thereof of the effect of the high tide and storm on December 31, 1912, upon the roadway, and requested that the street be repaired. The commissioners at this time advised those present that they would send out the road supervisor to look the matter over.

Upon the trial, evidence was offered that the Sound Trustee Company, the platter of the property, had appeared before the commissioners and was granted a franchise to put water mains in all the streets of the plat, and that subsequently a water system was installed. This evidence was rejected. While this ruling may not have been sufficiently vital to justify a reversal of the case for that reason alone, we think the testimony was admissible, at least as a circumstance tending to show the relation of the board of county commissioners to the streets and avenues in the plat. The evidence introduced on behalf of the appellant, and that is all we have before us upon this hearing, if true, was sufficient to carry the question to the jury as to whether or not the county had impliedly invited the public to use Beach Drive as a highway.

The next question is whether the appellant was guilty of contributory negligence as a matter of law. The evidence shows that she knew the condition of Beach Drive, and of the particular hole into which she fell, for some months prior to the accident; that she had frequently traveled over the street; that she had a lantern at home, but did not take it with her upon this particular occasion; that at the time of the accident she was advised by her daughter and knew they were

closely approaching the hole into which she fell. The evidence does not show, however, that she had any knowledge that the subsoil or under soil was washed away so as to leave the upper and hard surface in the form of a projecting ledge. She did not step into the hole, but while standing near the edge thereof, the ground upon which she was standing gave way under her feet.

The law does not in all cases hold a person injured by a defect in a highway guilty of contributory negligence merely because such person may have had previous knowledge of the defect, but generally treats the matter of knowledge as a fact or circumstance bearing upon the question of contributory negligence to be submitted to the jury along with all the facts and circumstances surrounding the accident, leaving it for them to determine whether, under the facts shown, the injured person was or was not guilty of contributory negligence. *Blankenship v. King County*, 68 Wash. 84, 122 Pac. 616, 40 L. R. A. (N. S.) 182. But in this case, as already mentioned, while the plaintiff had knowledge of the hole, it was not shown that she had knowledge of the particular defect which caused the ground to break off under her feet and precipitate her into the washout. Had she stepped over into the hole without the dirt giving way, a different question would be presented. Under the facts as shown by the evidence in the record, we cannot conclude that the appellant was guilty of contributory negligence as a matter of law, but the question is one for the jury.

The judgment will be reversed, and the cause remanded with direction to the superior court to grant a new trial.

MORRIS, C. J., ELLIS, CROW, and FULLERTON, JJ., concur.

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[No. 12607. Department One. May 14, 1915.]

CONSTANTINO T. MOSSO, *Respondent*, v. E. H. STANTON
COMPANY, *Appellant*.¹

APPEAL AND ERROR—LAW OF THE CASE. Questions decided adversely to appellant upon a first appeal will not be considered on a second appeal, where the evidence of existing conditions is the same as on the former trial.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Length of instructions, or repetition of matters contained therein, are not necessarily matters of prejudice, but the party complaining should show specifically in what way he is prejudiced thereby.

MUNICIPAL CORPORATIONS—INJURIES TO PEDESTRIAN—ACTIONS—INSTRUCTIONS. In an action for injuries to a pedestrian struck by a motor truck, in which the plaintiff's evidence showed that he was struck in the middle of the street and the truck was not where it should have been in compliance with ordinance regulations, while defendant's evidence showed that the truck was being driven as near the right-hand curb as possible, going in the direction it was, an instruction was not erroneous as determining the defendant's negligence through violation of the ordinance as to the use of the street as a matter of law, where it charged the jury that, if they find that plaintiff "had reached a place in the street where, if the defendant had operated its motor truck in accordance with the provisions of the city ordinance, he would have been out of the danger zone, then his failure to look north at the time when he started to cross the street would not preclude a recovery, because of his right to rely upon the use of the street by defendant in a lawful manner, and of his right to expect the automobile truck to be in a place where under the ordinance it had a right to be."

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. In an action for personal injuries sustained by a laborer, 35 years of age, capable of earning \$2.50 a day, a verdict for \$12,500 was excessive and should be reduced to \$7,500, although some two years after the injury, he was unable to dispense with a leather and steel jacket to support his trunk, and the fracture of the vertebrae still exists, and he still suffers some pain; since the former sum placed at seven per cent interest, would yield him more than his earning capacity for the whole of his expectancy, and he would still have the principal left.

¹Reported in 148 Pac. 594.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered December 30, 1913, upon the verdict of a jury rendered in favor of the plaintiff for \$12,500, for personal injuries sustained by a pedestrian struck by a motor truck. Reversed, unless \$5,000 is remitted.

Cannon, Ferris & Swan, for appellant.

Don F. Kizer, for respondent.

HOLCOMB, J.—This case was before us on a former appeal, and remanded for a new trial on account of an erroneous instruction. For a statement of the facts and the law applying thereto, see the decision on former appeal, 75 Wash. 220, 134 Pac. 941. On the former trial, the jury awarded respondent \$5,500. On retrial the jury allowed \$12,500. In the last trial, the evidence as to the manner of the happening of the accident and the details surrounding it was the same as in the former trial. The law of the case was, therefore, settled by the former decision.

The appellant again insists that the undisputed physical facts necessitate a reversal of the judgment, but the conditions existing were proven the same as in the former trial, and the contention as to undisputed physical facts was there passed upon adversely to appellant.

Appellant complains, also, of the length of the instructions as a whole, urging that they tend to confuse and not to enlighten the jury; but does not attempt to show specifically that they in any way prejudiced appellant. Neither the length nor the brevity of the instructions to the jury is necessarily prejudicial. From an examination of the instructions as a whole, we do not consider that the length of them or the repetition of various matters contained therein would necessarily prejudice appellant. *Alaska Steamship Co. v. Pacific Coast Gypsum Co.*, 78 Wash. 247, 138 Pac. 875.

Appellant complains also of an instruction as follows:

"If you should find from the evidence that the plaintiff, immediately before he started to cross the street failed to

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look north to observe whether there were approaching vehicles, and if you should find that such failure to look north amounted to negligence, that is, it was the failure to exercise ordinary care on his part, yet if you further find that he had reached a place on the street where, if the defendant had operated its motor truck in accordance with the provisions of the city ordinance, he would have been out of the danger zone, then his failure to look north at the time when he started to cross the street would not preclude a recovery, because of his right to rely upon the use of the street by the defendant in a lawful manner, and of his right to expect the automobile truck to be at a place where under the ordinance it had a right to be."

This, argues appellant, under the decision in *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876, determined the matter of the negligence of appellant by violating the ordinance as to use of the street as a matter of law, instead of submitting it to the jury as a matter of fact. We do not so consider it. The appellant's theory, and testimony introduced in support thereof, was that its automobile truck was being driven at the time of the happening as near the right-hand curb as possible, going in the direction it was, in accordance with the provisions of the ordinance. It did not seek to excuse its motor truck being in the middle of the street, but rested its case upon the theory that it obeyed the ordinance. On the other hand, the respondent and all his witnesses testified that the automobile truck struck the respondent in the middle of the street, and that therefore the truck was not where it should have been to comply with the ordinance. The instruction was therefore not erroneous.

There are other matters urged by the appellant which we think were all settled on the appeal in the former case and not necessary to be noticed now. Appellant, however, does contend that the verdict of \$12,500 is excessive, and that the size thereof indicates passion and prejudice on the part of the jury. The former verdict of \$5,500 was indeed small, where the injuries were of the character of the injuries to respond-

ent. It is, of course, impossible to measure in dollars and cents the amount of money that should be paid for the pain and suffering. It is useless to undertake to measure recovery therefor, and yet there must be a limit placed somewhere. The second trial occurred something like a year and a half after the first trial and something like two years after the injury. The second trial showed that the respondent is still unable to dispense with the leather and steel jacket which supports his trunk, that the fracture of the vertebrae still exists, and that the respondent can do no more than a little gardening by standing straight and using a hoe. This, of course, shows a slight earning power. He still suffers some pain. At the time of his injury, he was able to earn \$2.50 a day, and could do no other than manual labor. He was then thirty-three years of age and his expectancy was thirty-one years. His earning capacity was not to exceed \$800 a year, and it is a lamentable fact that, after a man passes middle life, his earning capacity in manual labor decreases and usually decreases very rapidly. If he were permitted to recover \$12,500, this sum placed at interest at seven per cent would yield him \$875 per annum, and for thirty-one years would bring \$2,325 over and above his earning capacity per annum if it remained at the full capacity, and still have the principal left. We think it too much.

While this court dislikes to interfere with the prerogative of the jury in passing upon a question of fact, when the verdict shows that it could not have been based upon the testimony, it becomes its duty to interfere. *Vowell v. Issaquah Coal Co.*, 31 Wash. 103, 71 Pac. 725. The sum of \$7,500 placed at interest at seven per cent, which is a low and reasonable rate, would yield \$525 per annum, which would probably be the average earning capacity at the utmost of the respondent during the period of his expectancy. He still has some slight earning capacity. We think, therefore, that \$7,500 is all that respondent is entitled to.

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If the respondent will elect to accept \$7,500 and costs in the court below and on appeal, within twenty days after the opinion is filed, then a judgment will be entered for that amount. Otherwise a new trial will be granted. If the remission of \$5,000 is not made as directed, the appellant will be entitled to a new trial with costs of this appeal.

MORRIS, C. J., CHADWICK, PARKER, and MOUNT, JJ., concur.

[No. 12126. Department Two. May 18, 1915.]

HENRY L. WILSON *et al.*, Respondents, v. THE SUN
PUBLISHING COMPANY, Appellant.¹

APPEAL AND ERROR—REVIEW—AMENDMENTS—PLEADING. Under Rem. & Bal. Code, § 1752, which requires the decision of a cause on appeal on its merits, disregarding technicalities, and considering amendments as made, the denial of a motion for nonsuit, in an action of libel, on the ground that the complaint did not allege the falsity of the publication, is not prejudicial, where the complaint negatived in terms every charge made in the publication and the answer averred the truth of the publication, thus supplying the alleged deficiencies.

LIBEL AND SLANDER—PLEADING—FALSITY. If matter published is libelous *per se*, it is not incumbent upon plaintiffs to allege its untruth; but, under Rem. & Bal. Code, § 293, that is a matter of defense which must be alleged and proven, in order to be available as such.

CONTINUANCE—GROUNDS—TRIAL AMENDMENT. A motion for continuance on granting leave to plaintiff to amend his complaint during the trial was properly denied, where the amendment presented no new issue.

LIBEL AND SLANDER—ACTIONABLE WORDS—PRIVILEGE. Newspaper publications falsely charging the plaintiffs with conducting a restaurant in an uncleanly and unsanitary manner do not fall within the rule of qualified privilege, and are therefore libelous *per se*.

SAME—INJURY TO BUSINESS. Under Rem. & Bal. Code, § 2424, providing that every malicious publication tending to expose any person to contempt, or to deprive him of public confidence, or to injure any

¹Reported in 148 Pac. 774.

person in his business or occupation shall be a libel, it is libelous *per se* to charge in newspaper articles that plaintiffs' restaurant is dirty, unsanitary, poorly ventilated, and the abode of microbes, etc., the natural tendency of the words used being to create the impression that the restaurant was an unwholesome place and unfit for public patronage.

SAME—CIVIL ACTION—MALICE. The civil action for damages for libel being, under the statutes of this state, one for the recovery of compensatory damages only, malice is not an essential element of allegation or proof.

SAME—ACTION—PARTIES. A publication touching partnership business may be libelous without mentioning the names of the individual partners, where, by designating the business name under which the plaintiffs operated, the article had just as damaging an effect upon the partnership business as if it had mentioned the names of the partners.

SAME—DAMAGES—NOMINAL DAMAGES. In an action for libel to recover upon a publication libelous *per se*, the plaintiff is entitled to nominal damages, although there may have been a failure of proof of damages, where the verdict of the jury on conflicting evidence finds that the charges were untrue.

SAME—ACTUAL DAMAGES—SUFFICIENCY OF EVIDENCE. In an action for civil libel in publishing untrue articles respecting plaintiffs' restaurant, proof of actual damages occasioned thereby to plaintiffs' business was not established by evidence showing a diminution of patronage, where it appears that plaintiffs' own books showed a steady falling off, beginning prior to the articles and continuing thereafter at about the same ratio, that several competing restaurants had been established in the neighborhood during the period of the decline of plaintiffs' business, and there was no more than vague testimony touching a few isolated instances of desertion by patrons because of the articles, constituting no more than a scintilla of evidence of damage reasonably traceable to the publication.

SAME—EVIDENCE—ADMISSIBILITY. In an action for libel charging that defendant's untrue publications had injured the business of plaintiffs, evidence of what plaintiffs paid for the business and what they sold it for was inadmissible for the purpose of showing damages suffered.

SAME—ACTION—EVIDENCE. In an action for civil libel instituted by partners for damages to their partnership business, evidence of injury to the reputation and feelings of either partner as an individual is inadmissible.

LIBEL AND SLANDER—ACTION—INSTRUCTIONS. In an action for libel brought by a partnership, it is error to instruct the jury to find

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for plaintiffs, if the articles published were calculated to injure the plaintiffs either in their reputation or in their business, by exposing them or either of them to ridicule or contempt, or injuriously affect the reputation of either of them in the community, when there was little evidence of injury to the reputation of either partner, and no evidence of injury to the separate business of either, and the only damages recoverable would be by the partners in their joint capacity.

Appeal from a judgment of the superior court for King county, Humphries, J., entered March 2, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for libel. Reversed.

John P. Hartman and Arthur E. Nafe, for appellant.

Tucker & Hyland, for respondents.

ELLIS, J.—In August, 1913, the plaintiffs were, and since October, 1912, had been, copartners operating a cafeteria known as the Epler Cafe, on Second avenue, in the city of Seattle. They commenced this action on August 29, 1913, to recover damages for injuries to their business which it is claimed were caused by certain articles printed and published in *The Seattle Sun*, a newspaper then being published by the defendant. The first publication was on August 1, 1913, and reads as follows:

“Restaurant Kitchen an Awful Place in Summer Time Says Sun Reporter After a Visit to One.

“Tour Yesterday Reveals Many Changes for Better in Seattle, but He Lands in Cafeteria Where Rotary Fan is Only Thing That Makes Life Possible.

“(By the Author of ‘The Confessions of a Dishwasher.’)

“If it were not for the big rotary fan in the Epler Cafeteria kitchen, nothing could live there—not even a microbe. Certainly nothing could exist there without holding its nose.

“This is summertime in the kitchens. The hot sun which beats down upon the streets is not hotter than the roasting oven in the kitchen where foodstuffs spoil quickly and microbes grow fat.

“There has been a general cleaning up in most of the Seattle restaurant kitchens and dishwashing parlors since *The Sun* started its clean-up campaign. In some places it has been barely noticeable—the trickle of hot water sounding the

first call to cleanliness, or the swish of a scrubbing brush on saturated floors. In other places, the transformation has been complete. Old saturated wooden tables, drainboards and ice boxes have been torn out, and new metal ones put in their places. Pervious floors have been ripped up to make room for clean white tile.

"Eat in More Comfort

"I am a quick luncher and a haunter of restaurants. And I confess that I am beginning to eat my three meals a day with a greater degree of comfort.

"In my daily travels I have noticed peculiar things—such as new refuse cans with real lids on them, in the alley behind Rippe & Chapman's combination kitchen, and real steam rising from the dishwasher at the White Lunch.

"But yesterday it was hot—real hot for Seattle—and I had a real or imagined desire to find out how the living is in a hot kitchen in hot weather. A friend and I chose a kitchen at random—one to which I had not paid an extended visit before. It happened to be the Epler Cafeteria, 813 Second avenue.

"To repeat, nothing could survive there if it were not for a big rotary fan which appears to have been attached to a motor and placed in the window for the express purpose of forcing an exit for ill odors arising from food scraps which are on the first road towards disintegration.

"Ice-Box Hash.

"The floors of the kitchen were wet, slippery and littered with food scraps. Dishes covered with food from the last meal were left standing on the drainboard near the dishwashing machine. Filthy saturated wooden tables were absorbing the moisture from the latest left-overs.

"And the ice-boxes—saviors of food in the summer time, but flavor mixers and microbe harbors at the Epler Cafeteria. They were old, saturated, wooden affairs, capable of absorbing anything, even the roasting heat of the kitchen.

"We opened them one by one and looked inside. There, in each one, piled together was the greatest assortment of foods which I have ever seen accumulated in a single ice-box. It might have been appetizing—to one who is fond of hash.

"A Fish Box's Contents.

"There were things to eat, all the way from potatoes and hamburger steak to the latest salads and mayonnaise dressings, in a fish box.

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"But it was not quite so appetizing when we took a knife and scraped from the saturated wooden trays and walls of the ice box the remains of former meal preparations—generations upon generations of them, it appeared to me.

"And the refuse cans and the scraps which were spilled over make it fortunate there are not many flies in Seattle.

"Yesterday we paid a visit to other restaurants in Seattle, which is another story.

"And before long we shall visit other restaurants—other stories."

The second article was published on August 4, 1913, and reads as follows:

"Conditions in Local Restaurants.

"It is a matter of common knowledge that many restaurant kitchens, also many hotel kitchens, are carelessly conducted and in some cases are absolutely filthy.

"For years no effort was made by the city authorities of Seattle to properly supervise restaurant and hotel kitchens, and there seemed to be no escape from the uncleanly conditions for the thousands of people who patronize these places.

"It is true that there were restaurants and hotels where these bad conditions did not exist, and which were cleanly in every respect, but the good and the bad were so indiscriminately mixed together, that there seemed to be no possible way for the public to distinguish between them.

"The Seattle Sun undertook a public service in investigating these places, and to do so had men go to work in them as dishwashers, etc., for the purpose of securing information.

"As a result many facts were secured and published in The Sun and there followed a general cleaning up all along the line.

"Conditions today average much better than they did some months ago.

"The Sun has, however, determined to follow this matter up from time to time and see whether the reformation is progressive, rather than retrogressive.

"Last week this newspaper contained some strictures on certain cafeterias, including Epler's the kitchen of which was visited by two Sun representatives on a very hot day.

"Objections to the statements made by these men and printed in The Sun are made by Mr. Wilson, one of the pro-

prietors, and by others who are friends of the management.

"Mr. Wilson states that immediately following the appearance of The Sun with the strictures on his kitchen he invited fifteen or more of his regular patrons to walk out in his kitchen and investigate for themselves.

"This information The Sun gives as a matter of course, and it also publishes a letter from Edward C. Kilbourne, manager of the building, who states that the kitchen is clean and sanitary. There is not the slightest desire upon the part of The Sun to misrepresent the conditions in Epler's or in any other eating place.

"The men sent out by The Sun to investigate the restaurants do not in any way alter their report, however. They were absolutely unbiased and were acting under rigid instructions to render truthful accounts of everything they discovered.

"The dishwashing arrangements in Epler's were found to be modern and in every way sufficient. The criticisms made were all directed at specific kitchen shortcomings.

"The task of bringing all local restaurants up to a general high average of cleanliness is making The Sun some enemies among proprietors and managers, and there is a loud protest from several of them, who charge loss of business, etc.

"The sensible restaurant proprietor who has been criticised will devote all his energies to immediately putting his kitchen in a condition above reproach, and will waste no breath in idle denunciations.

"He should recollect that restaurants are in reality public service institutions and that the people have a right to demand the very best service from them."

The final article complained of was printed in The Seattle Sun on August 5, 1913, and reads as follows:

"Finds It Quite Possible to Keep Restaurant Kitchens Cool and Clean.

"Sun Reporter Visits Wing's Cafeteria, Gerald's Cafe and the Hofbrau—Ice Boxes May Be Clean and Dry Also.

"(By the Author of 'The Confessions of a Dishwasher.')

"The same afternoon last week on which I visited the Epler Cafeteria I made a trip also through the kitchens of Gerald's Cafe, 824 First Avenue, Wing's Cafeteria, 1409 First avenue,

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and the Hofbrau Cafe, First avenue and Madison street. These were all cleaner than the Epler kitchen.

"Soon after The Sun began to look into Seattle kitchens and dishwashing establishments, Wing's Cafeteria proceeded to rip out old floors and fixtures of its old kitchen and start in afresh with everything clean and white. All the old dishwashing things were destroyed. In place of old floors was laid white tile, while metal tables, trays and shelves took the places of old wooden ones.

"The arrangements for dishwashing in Wing's Cafeteria are entirely separated from the kitchen. The dishes have a large sunny room all to themselves—a room with plenty of air in it, with white walls and ceilings and a white tiled floor. Except for one board on which the dishes are placed after they are washed and dried, there is not an inch of wood in the place. Everything is solid, of stone or metal. Cracks and crevices and porous surfaces in which food might collect are unheard of.

"Diners May Witness.

"There are three dishwashing outfits in this white room, one for washing and rinsing plates and platters, another for washing and rinsing silver and glasses, and still a third for pans.

"Steaming hot water is running in all of them. The room enters directly into the big dining room, so that diners may have a full view of the process if they wish. It is high above the ground and through its spacious windows overlooks Elliott Bay.

"The kitchen where the food is prepared and cooked is downstairs below the dishwashing room, but not below the surface of the earth. It is clean and dry with hard, substantial walls and floors. Everything is fresh and clean-smelling.

"The combination kitchen and dishwashing establishment of Gerald's Cafe, 824 First avenue, was almost unbearably hot on that warm afternoon when I visited it. The kitchen appeared to be buried in the side of the first hill. It was dark and ventilated by only one small window at the top, which was at the surface of the earth.

"Hot at Gerald's.

"Gerald's kitchen was roasting hot, like its big brick oven, and it lacked circulation of fresh air. It was cleaner than the Epler kitchen, not as clean as Wing's and the Hofbrau.

"There were old saturated wooden tables and shelves, which had the appearance, however, of being scrubbed occasionally. This, like the other kitchens which I visited that afternoon, was equipped with a hot water dishwashing outfit, capable of handling and really cleaning the dishes of its customers. The floor was wet in some places, and I noticed a few scraps of food scattered about. It was a substantial, level floor, however, and offered a solid footing. There was no fan in the kitchen. With its one tiny skylight window at the top, it resembled an old-fashioned bake oven itself.

"Hofbrau Cool and Clean.

"The kitchen of the Hofbrau Cafe was cool and clean. Its solid cement floor was especially clean, dry and free from dirt, grease and wet. There were wooden tables—but they were solid and made of hard wood. And they were white and clean, free from grease.

"Ice boxes and fish boxes in the Hofbrau were cool and appetizing as I opened them. They were not hash boxes. Each separate variety of food had a separate apartment all its own to keep fresh in. Fish were placed in one box, meats in another, vegetables in a third, while butter and dairy products were kept entirely separate. Each cut of meat appeared as fresh as the day it was killed. The fish has its own icy room away from the butter. There was no evidence of stale food remainders on the inside linings. The interiors of the boxes were clean, cool and dry. It was possible to light a match on the inside wall. I did it."

The complaint alleges that the plaintiffs' restaurant had always been carried on in a first-class manner and had always been clean, sanitary and well ventilated; that prior to the publication complained of, the business, with the good will thereof, was of a reasonable value of \$30,000; that the libelous matter was published maliciously and without probable cause or any cause whatever; that the things set forth were false and untrue, and were known to be untrue by the officers and manager of the defendant when they were published; that by reason of the publication of the articles complained of the plaintiffs, both in their business and as citizens of Seattle, have been injured in their good name, fame and credit

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and brought into public scandal, infamy and disgrace among all those people among whom they had been doing business; that the good will of their business has been destroyed, and that plaintiffs have been damaged in the sum of \$25,000. The allegation of falsity was inserted by amendment, over defendant's objection, at the close of the plaintiffs' evidence.

In its answer the defendant denied the allegation that plaintiffs' restaurant was clean, sanitary and well ventilated; denied that the business was worth \$30,000 at the time of the publication of the articles complained of; admitted the publication of the articles; denied that the publications were made maliciously; denied that the plaintiffs were damaged in the sum of \$25,000, or any amount; and, as an affirmative defense, averred that the facts published in the articles were true and were published with a full belief of their truth, without malice and for the protection of the citizens of and visitors to the city of Seattle. The reply traversed the affirmative matter in the answer.

The evidence is too voluminous to be set out in a connected statement. We shall discuss it so far as necessary in the consideration of the points presented. At appropriate times the defendant moved for a nonsuit and for a directed verdict. These motions were overruled. The jury returned a verdict in favor of the plaintiffs in the sum of \$7,500. The defendants moved for a verdict *non obstante* and for a new trial. These motions also were overruled. From the judgment entered upon the verdict, the defendant appeals.

While there are many assignments of alleged error, we shall consider only those which seem necessary to a proper disposition of the case.

As preliminary to the discussion on the merits, a question of pleading is presented. It is claimed that a nonsuit should have been granted because, when the motion was made, the complaint contained no allegation that the offending publications were untrue, hence did not state a cause of action. For many reasons there is no merit in this claim. In the first

place, the complaint negatived in terms, by its direct allegations of cleanliness and sanitation, every charge made in the publications. In the second place, the answer averred the truth of the publications, thus supplying the supposed deficiencies now complained of and further emphasizing the issue to which the respondents' evidence was directed. In such a case we are admonished by the statute to proceed with the decision of the cause on its merits, disregarding technicalities. Rem. & Bal. Code, § 1752 (P. C. 81 § 1255); *German American Bank of Seattle v. Wright*, ante p. 460, 148 Pac. 769; *Yeisley v. Smith*, 82 Wash. 693, 144 Pac. 918; *Kelly v. Lum*, 75 Wash. 135, 134 Pac. 819, 49 L. R. A. (N. S.) 1151; *Gaskill v. Northern Assurance Co.*, 73 Wash. 668, 132 Pac. 643; *Bonne v. Security Savings Society*, 35 Wash. 696, 78 Pac. 38.

In the third place, if the matter published was libelous *per se*, it was not incumbent upon the respondents to allege its untruth. That was a matter of defense which to be available must be alleged and proven as such. Rem. & Bal. Code, § 293 (P. C. 81 § 277). At common law, of which the statute is merely declaratory, the truth of a libelous charge, though no defense in a criminal prosecution for libel, was usually a complete defense in a civil action for damages. *State v. Sefrit*, 82 Wash. 520, 144 Pac. 725; *Haynes v. Spokane Chronicle Pub. Co.*, 11 Wash. 503, 39 Pac. 969; *Leghorn v. Review Pub. Co.*, 31 Wash. 627, 72 Pac. 485; 4 Blackstone, Commentaries, p. 150.

This disposes also of appellant's claim that the court erred in refusing a continuance when respondents were permitted to amend their complaint by inserting the specific allegation that the publications were false. This presented no new issue. The motion for a continuance was properly denied.

On the merits it is contended that a verdict for the appellant should have been directed at the close of all the evidence. Several reasons are assigned for this claim: We shall consider them in what seems to be their logical order.

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I. It is claimed, in substance, that the offending publications, being merely critical of matters of public interest, fall within the rule of qualified privilege and were therefore not libelous *per se*. Matters of such public interest as fall within the rule of qualified privilege are classified in Newell on Slander and Libel (2d ed.), p. 576, as follows:

“(1) Matters concerning the administration of the government. (2) Matters pertaining to the administration of public justice. (3) Matters relating to the management of public institutions and local authorities. (4) Matters relating to appeals for public patronage. (5) Matters concerning literary publications, books and pictures. (6) Matters concerning the character and quality of public entertainments. (7) Matters relating to religious bodies, churches and associations.”

It is obvious that the publications here in question do not fall within any of these classes unless it be “matters relating to appeals for public patronage.” That class, however, relates to those who are in a sense public characters, such as seekers for office, artists, inventors, showmen, patent medicine men, and such others as by appeals to the public by advertisement, in a special sense directly challenge public criticism of their claims. Newell, Slander and Libel (2d ed.), p. 588. There is nothing of that nature in the case presented here. The mere fact that a man’s business, in a sense, touches the health and comfort of his customers or patrons does not invoke the rule of special privilege against him. Those who desire to criticise the manner in which his business is conducted are sufficiently protected against an action for damages by their absolute immunity in publishing the uncolored truth, and against a criminal prosecution in a proper case by negating malice, which, under our present criminal statute, is the gist of the criminal offense of libel. *State v. Sefrit, supra*. We have been cited to no authority, and have been able to find none, which would carry the rule of qualified privilege to the extent here asserted.

II. Not being privileged, the next question is: Were the articles libelous *per se*? Our criminal statute defines libel against the living as follows:

"Every malicious publication by writing, printing, picture, effigy, sign or otherwise than by mere speech, which shall tend:

"(1) To expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or . . .

"(3) To injure any person, corporation, or association of persons in his or their business or occupation, shall be a libel. . . . Rem. & Bal. Code, § 2424 (P. C. 135 § 343).

Eliminating the statutory element of malice, either actual or implied, an essential only of criminal libel, this definition meets the essentials of libel actionable *per se* as generally recognized in civil actions for damages. Newell, Slander and Libel (2d ed.), p. 43.

"Unfortunately, the law of libel has been obscured by a mass of technicalities and subtle refinements. When language is used concerning a person or his affairs which, from its nature, necessarily must, or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication *prima facie* constitutes a cause of action, and *prima facie* constitutes a wrong, without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication; that this is all that is meant by the term 'actionable *per se*.' Therefore the real practical test, by which to determine whether special damage must be alleged and proved in order to make out a cause of action for defamation, is whether the language is such as necessarily must or naturally and presumably will, occasion pecuniary damage to the person of whom it is spoken." *Pratt v. Pioneer-Press Co.*, 35 Minn. 251, 28 N. W. 708.

That the articles here in question had the clear tendency to injure the respondents in their partnership business is too plain for argument. They charged that this restaurant was hot, dirty, poorly ventilated, and insinuated the presence of "microbes." The natural meaning of the words used was

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that the restaurant was an unwholesome place and unfit for public patronage. It has been held libelous *per se* to charge the sale of diseased and unwholesome meat. *Mowry v. Raabe*, 89 Cal. 606, 27 Pac. 157; *Young v. Kuhn*, 71 Tex. 645, 9 S. W. 860. It has also been held actionable *per se* to charge that a hotel keeper "kept no accommodations, and a person could not get a decent meal or decent bed if he tried." *Trimmer v. Hiscock*, 27 Hun (N. Y.) 364. The articles here in question were, from their natural tendency, actionable *per se*.

III. It is next claimed that there was a failure of proof because there was no evidence of malice. If this were a criminal prosecution, malice would be a material element and would be inferred from the necessary tendency of the articles. The criminal statute so declares. Rem. & Bal. Code, §§ 2424, 2425 (P. C. 135 §§ 343, 345). But in this state malice is not an essential element of civil libel. This results from the nature of the case. The civil action for libel is an action for damages, and, as in other actions sounding in tort, compensatory damages only can be recovered. It is obvious that these would be the same no matter what the motive which inspired the publication. Malice could only be material on the question of punitive or exemplary damage. But in this state punitive or exemplary damages cannot be recovered except where specifically authorized by statute. *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. 842, 11 L. R. A. 689; *Willson v. Northern Pac. R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146; *Sloan v. Langer*, 6 Wash. 26, 32 Pac. 1015; *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. 650, 36 Am. St. 156; *McGill v. Fuller & Co.*, 45 Wash. 615, 88 Pac. 1038; *Caldwell v. Northern Pac. R. Co.*, 56 Wash. 223, 105 Pac. 625; *Baer v. Chambers*, 67 Wash. 357, 121 Pac. 843, Ann. Cas. 1913 D. 559; *Phillips v. Thomas*, 70 Wash. 533, 127 Pac. 97, Ann. Cas. 1914 B. 800, 42 L. R. A. (N. S.) 582; *Corcoran v. Postal Telegraph-Cable Co.*, 80 Wash. 570, 142 Pac. 29. We have no statute allowing exemplary or punitive damages for libel.

In two cases this court has held that, in a civil action for libel, the element of malice is immaterial. *Byrne v. Funk*, 38 Wash. 506, 80 Pac. 772; *Woodhouse v. Powles*, 43 Wash. 617, 86 Pac. 1063, 117 Am. St. 1079, 8 L. R. A. (N. S.) 783.

In the *Byrne* case, this holding was apparently based on the fact that malice was not included as an essential element in the then existing statute defining criminal libel. Ballinger's Code, § 7087; Rem. & Bal. Code, § 2777. In the *Woodhouse* case, it was based definitely, and as we now conceive more logically and soundly, upon the ground that compensatory damages alone can be recovered in a civil action for libel. While our present statute defining criminal libel makes malice an essential element, that is because the action is punitive in its nature. The civil action being merely compensatory in its nature, and there being no statute authorizing punitive damages in such cases, it follows of necessity that malice or lack of malice is still immaterial in such cases, notwithstanding the change in the statutory definition of criminal libel.

IV. It is also urged that the articles were not libelous in that they did not mention the name of either of the respondents. We find no merit in this claim. The complaint, considered in its entirety, did not state a cause of action in favor of the respondents as individuals, but as partners. The libel was a libel touching their partnership business. The articles did mention the name of that business, which was known as the "Epler Cafe." By designating the name of their business, the article had just as damaging an effect upon the partnership business as if it had mentioned the names of the partners.

V. Finally, it is asserted that there was a total failure of proof of damages. Though the publication was not actuated by malice, it was actionable *per se*. The respondents were at least entitled to nominal damages, unless the things stated in the offending articles were true. The appellant attempted

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to prove their truth in justification. There was much evidence so tending. There was also much evidence to the contrary. On this conflict of evidence the question was clearly one for the jury. The verdict, being supported by substantial evidence that the charges were untrue, concludes the question. A review of this phase of the evidence would be useless.

But it was still incumbent on the respondents to prove actual damages to justify a recovery more than nominal. They attempted to prove specific damages by evidence of a falling off of the patronage of the restaurant, occasioned by the publication of the articles. Over appellant's objections, they sought to show, by the testimony of certain employees and a few customers, that there was a decided falling off in patronage immediately following the publication of the articles, especially after the appearance of the first article. This evidence was vague and unsatisfactory at best. They also introduced their books of account, but these showed that, beginning some six months prior to the publication of the first article, there had been a gradual falling off in attendance and a consequent reduction in the receipts of the business, and that this reduction continued at practically the same rate subsequent to the publication of the articles as prior thereto, until the restaurant was finally sold in December, 1918. They also introduced in evidence, over objection, a list of names of some nineteen persons who, it was stated by one of the respondents, stopped dining at the Epler Cafe immediately following the publication of the articles. He admitted, however, that as to most of these his information was based on hearsay. The other partner, who furnished the list, did not attempt to say that, by interviewing the persons named, or otherwise, he learned their reasons for the discontinuance. Four or five witnesses testified that they stopped dining at the restaurant after the publication of the articles. One of them had dined there but once. Another testified that he personally knew of the condition of the kitchen and only two or three of them testified that they failed to return to the

respondents' restaurant on account of the publications. Over objection, the respondents were permitted to testify as to what they paid for the business and what it was finally sold for on December 1, 1913. The respondent Wilson testified that he bought his half interest in October, 1911, for \$6,500, and the respondent Carle that he bought his half interest in October, 1912, for \$6,800. Carle testified that when he sold he received for "the whole outfit" \$3,500. It does not clearly appear whether this represented one-half of the sale price or the whole sale price. This last evidence was clearly inadmissible, especially in view of the fact that, prior to the publication of the articles, the respondents' own books showed that their business was already falling off at a rate which continued but was not accelerated after the publication of the articles in question. It is obvious that many other elements might have, and probably did, enter into the purchase price and sale price of a business such as a restaurant. The evidence seems to us entirely too speculative and remote to have any probative value on the issue of damages and should have been excluded.

The appellant introduced evidence of the fact that, during the period of the decline of the respondents' business, several competing restaurants and cafes were started in adjoining blocks and in the immediate neighborhood of their place of business. It is the undisputed testimony of experienced restaurant men that this fact alone would have a necessary tendency to diminish the respondents' business. A careful consideration of all of the testimony touching special damages by diminution in patronage occasioned by the offending articles, forces the conviction that there was no such proof of any material falling off of patronage or any measurable or material injury to respondents' business caused by the publications as to take the question of special damages to the jury. In view of the showing made by respondents' own books which indicated a steady falling off beginning long prior to the publication of the articles, and in view of the

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proof that the near location of several competing establishments would amply account for its steady continuance, we think that the vague testimony touching a few isolated instances of desertion of patrons because of the articles was wholly insufficient to constitute more than a scintilla of evidence of damage reasonably traceable to the publications. The only reasonable inference is that it was due to the adequate cause proven.

A case closely in point is presented in *Trimmer v. Hiscock, supra*. The defendant sued for damages for slanderous words injuring his business as a hotel keeper. He attempted to prove special damages by showing that, since about the time of the alleged slanderous words, there was a falling off in his business. This, however, was accounted for by the plaintiff's own witnesses, who testified that about that time a Good Templars organization was effected in the village and that many of his old customers and patrons joined the organization and ceased to frequent his house. Also, that at about that time numerous prosecutions were instituted against him for violations of the excise laws, and that it was due to this organization and these prosecutions that his business declined. A nonsuit was granted, but the supreme court held that while there was no proof of special damages, the words were actionable *per se*, and remanded the case for trial on that account.

VI. But one other question remains to be considered. The respondents, over the appellant's objection, were permitted to introduce the testimony of one of the partners as to his standing and reputation and the standing of his family in the community. It was objected that this testimony was immaterial in that the action was one for injury to the partnership business, and that injury to the reputations and feelings of either partner as an individual was not in issue. The objection was overruled, but the inquiry was not further pursued. Little evidence was offered showing an injury to the reputation of either of the partners, or humiliation or

mental suffering by either, on account of the publications. In any event we think such testimony was inadmissible. The rule which we conceive to be the correct one is thus stated in Newell, Slander and Libel (2d ed.), p. 371:

"Two or more partners may join in an action of slander for words spoken of them in the way of their trade, whereby they have sustained special damage. They may sue jointly for slander of them in respect of their trade without showing the proportion of their respective shares. But damages cannot be given in such an action for any injury to the private feelings of the plaintiffs, but only for such injury as they may have sustained in their joint trade or business."

The Supreme Judicial Court of Massachusetts, in *Gazynski v. Colburn*, 11 Cush. 10, states the rule as follows:

"It has always been held that when words are spoken of two or more persons, they cannot join in an action for the words, because the wrong done to one is no wrong to the other. The case of husband and wife is not an exception to this rule. The exceptions to it are the case of words spoken of partners in the way of their trade, and the case of slander of the title of joint owners of land."

In *Donaghue v. Gaffy*, 53 Conn. 43, 2 Atl. 397, the supreme court of Connecticut said:

"We will only add that it is well settled that, in an action for libel by two or more partners, damages cannot be recovered for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business."

For a case closely analogous in principle, see also, our recent decision in *Hall v. Galloway*, 76 Wash. 42, 135 Pac. 478. The court, touching this question, instructed the jury as follows:

"If, therefore, you should find from the evidence that the defendant published the article or articles charged in the complaint and that they were calculated to injure the plaintiffs either in their reputation or in their business by either exposing them or either of them to ridicule or contempt or to

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injuriously affect their reputation or the reputation of either of them in the community, or injuriously affect their business as restaurant proprietors, then, unless the defendant should prove it was justified in publishing the articles, you must find for the plaintiffs."

This instruction was repeated in substance several times in different parts of the charge. It is clearly erroneous for two reasons. In the first place, there was little evidence of injury to the reputation of either partner as an individual, and no evidence of injury to the separate business of either. The publications, though libelous *per se*, made no reference to either of the respondents personally except in one instance, and that in connection with the partnership property. They made no reference to the separate business of either. In the second place, the only damages recoverable in this action are, according to the foregoing authorities, such damages as resulted in injury to the partnership business itself, and to the partners in their joint capacity.

It is clear, therefore, that the judgment must be reversed. There was no evidence of special damages sufficient to take the case to the jury, and the element of damage to reputation or feelings, or the separate business of the respondents as individuals, could not be considered in this joint action. The respondents were only entitled to nominal damages under the evidence.

We find no merit in respondents' claim that there was a mere misjoinder of parties and that the objection thereto was waived by the failure of appellant to demur to the complaint. There was no misjoinder. The complaint itself was in the name of the plaintiffs as partners. The appellant had a right to construe it according to its legal effect as an action for damages to the partnership business. The objection to treating it otherwise was interposed as soon as evidence tending to prove individual damage was offered. A review of the authorities cited by respondents in this con-

nection would be idle. They are clearly distinguishable on the facts and in the nature of the cases.

The judgment is reversed, and the case is remanded with direction to enter a judgment for the respondents for nominal damages only.

MAIN, MOUNT, and CROW, JJ., concur.

[No. 12395. Department Two. May 18, 1915.]

*In Re SHILSHOLE AVENUE.*¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—FINDINGS OF COURT—REVIEW. The findings of the superior court made upon attacking the assessment roll for a local improvement in eminent domain proceedings by cities, in the absence of exceptions, are conclusive on appeal, in view of Rem. & Bal. Code, § 7795, providing that the hearing shall be conducted as in other cases at law tried by the court, and findings made thereon and judgment entered accordingly.

SAME—PUBLIC IMPROVEMENTS—ASSESSMENT OR GENERAL TAXATION. The establishment of a county canal flooding certain city streets and abutting lots, as a general public improvement, does not prevent the assessment of the same property for the purpose of elevating the grade of the streets above the water level, as a local improvement, on the theory that the raising of the grades was necessitated by a general public improvement as distinguished from a local improvement and that its expense was one which should be borne by general taxation.

SAME—ASSESSMENTS—SPECIAL BENEFITS. An assessment for a local improvement by elevating the grade of streets, should be set aside as made upon a fundamentally wrong basis, where the lower court found that a potential flooding of the district for a county canal required elevation of the streets but slightly above water level which would be a benefit to the property, but that it would not be a benefit to raise them, as proposed in the present proceedings, to a height of nine feet above the water level; and after awarding damages for such excessive elevation, proceeded to assess the property for the amount of such damages, in addition to an assessment for the slight elevation necessary to make them dry and usable; since there was no relation between the benefits to the benefited

¹Reported in 148 Pac. 781.

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property and the damages to the damaged property, and the thing which conferred the benefit did not inflict the damage; and it is immaterial that both were parts of one improvement.

SAME. Under Const., art. 7, § 9, which provides that "the legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited," and under Rem. & Bal. Code, § 7790, which provides that "no property shall be assessed a greater amount than it will be actually benefited," there can be no special assessment to pay for a thing which has conferred no special benefit on the property assessed, and hence general benefits cannot be made the basis of a levy.

SAME—ASSESSMENTS—REVIEW—NECESSITY OF APPEAL. The final judgment of the lower court in passing upon the assessment roll in condemnation proceedings being conclusive upon all who are content to accept it, the reversal of such judgment on appeal and cancellation of assessments therein decreed affects only the property of the parties to the appeal.

Cross-appeals from a judgment of the superior court for King county, French, J., entered September 29, 1914, authorizing the levy of an assessment upon property specially benefited by a public improvement. Reversed.

Donworth & Todd, Higgins & Hughes (Hyman Zettler, of counsel), for appellants Donworth *et al.*

Ballinger & Hutson, for appellants Stimson *et al.*

James E. Bradford and *Ralph S. Pierce,* for respondent and cross-appellant City of Seattle.

ELLIS, J.—This case involves an assessment roll, made by the eminent domain commissioners of the city of Seattle, to pay the damages resulting from the raising of the grade of Shilshole avenue and the incidental change of the grades of other streets and avenues and approaches thereto.

To avoid confusion, it must be borne in mind throughout that it is not the physical fill nor any benefits that might accrue from the actual construction of the regrade, but only the assessment to pay damages awarded in the condemnation proceeding for the change of grade, which is here involved.

In 1890 and 1894, Congress made certain appropriations in aid of the project known as the Lake Washington Canal. These were conditioned that the local authorities should secure a right of way for, and a release of all liability for damages occasioned in the construction of, the proposed canal. Accordingly the state legislature passed an act, Laws 1895, p. 3, authorizing counties to condemn lands, rights and interests, whether private or already devoted to public use, in aid of any public work undertaken by the government of the United States or of this state. The act declared all damages accruing and amounts payable by reason of the exercise of the power conferred to be for general county purposes, and payable by a general county tax to be levied and collected as other taxes for general county purposes.

Through the exercise of the power conferred by that law, King county, in the year, 1898, by a proceeding in condemnation in aid of the construction of the Lake Washington Canal, acquired the right to flood, to an elevation of seven feet above city datum, certain property and streets located, for the most part, in the then city of Ballard. City datum is the level of mean high tide. In that proceeding, the property owners received compensation for the flooding of their property, and the city of Ballard for the flooding of the streets. The amount allowed to the city was \$7,500, which the city accepted and devoted to municipal uses. Subsequently, and some years prior to the proceedings here involved, the city of Ballard was annexed to the city of Seattle, which city succeeded to all of the property rights and obligations of the city of Ballard.

The Lake Washington Canal follows Salmon Bay, a narrow inlet lying between the district of Ballard and Seattle proper and extending from Puget Sound almost to Lake Union. Shilshole avenue, the main arterial highway of this district, takes a general course parallel to the north shore of Salmon Bay and lies only two or three feet above the water level. Between Shilshole avenue and the channel of Salmon Bay,

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lies a large area of tide lands. To the north of Shilshole avenue, the land and the streets slope at a gently rising grade for a distance of two or three blocks, where the ground rises abruptly. It is this low lying area between Salmon Bay and the foot of the hill to the north which is to be flooded by the raising of the waters of Salmon Bay through the proposed construction of a lock at its mouth. This potentially flooded area comprises the territory sought to be assessed in the proceeding before us. It is practically coincident with the limits of the assessment district in which it is proposed to raise the street grades. It is conceded that, were it not for the construction of the canal, there would be no need for any change of street grades.

As we have seen, the construction of the canal, according to the old county condemnation, will raise the water of Salmon Bay to seven feet above city datum. In order to have dry streets it is, of course, necessary that they be filled to a height somewhat more than seven feet above datum. Instead of raising these streets to eight or nine feet above datum, which would bring them above the canal and put them in the same condition relative to the water as they now are, the city, for reasons which do not appear in the record, has provided in the ordinance initiating this improvement for establishing the new grades at an average of sixteen to eighteen feet above datum. This will bring the street level nine or ten feet above the water in the completed canal.

The undisputed evidence shows that the only special benefit resulting to the property in this district consists in bringing the streets slightly above the water level of the canal so as to make them dry and usable, that is to an elevation slightly higher than seven feet above datum.

Pursuant to the initiatory ordinance, the city brought a condemnation suit to acquire the right to change the grades from the existing elevation to the above mentioned elevation of sixteen to eighteen feet above datum. The damages awarded, together with interest and costs, approximate

\$220,000. It is to pay these damages that the roll here in question was made. In the condemnation proceeding, no damages were awarded for that portion of the change of grade necessary to bring the streets from the existing elevation to where they would be dry and slightly above the canal level, that is, slightly higher than seven feet above datum. The only damages allowed were such as resulted from the raising of the grade from seven feet above datum to the proposed final level of sixteen or eighteen feet above datum. This was on the theory then held by counsel for the city, and apparently adopted by the court, that no damages could be paid for the raise of grade up to the canal level so as to bring the streets out of the way of the water, because it was claimed damages for that raise had already been paid in the old King county condemnation suit. We are not here vitally concerned with the court's reason for limiting the damages recoverable to those occasioned by the raising of the grade from the new water level of seven feet above datum to the new proposed street level of sixteen feet above datum, the vital thing being that, as a matter of fact, the damages were so limited.

The reference of the matter to the eminent domain commission to assess the property benefited by the change of grade to pay the damages was in conformity to the initial ordinance, which provided that the entire cost "shall be paid by special assessment upon the property specially benefited," and that "no part thereof shall be paid from the general fund of the city of Seattle." The eminent domain commissioners found, and so testified, that the sole special benefit to the property included in the assessment district consisted in bringing the streets up to the canal level or slightly above. In making the roll, however, they assessed this benefit to meet the awards rendered for the additional raising of grade up to plus sixteen, in spite of the fact that they also found, and so testified, that the property was not benefited by this additional raise in any manner whatever. They all further

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testified that the roll included all the property specially benefited within the district, and assessed all of that property to the maximum in which it was specially benefited. The roll resulted in assessments amounting to something over \$149,000, leaving a deficit of \$70,949.54, for which the commissioners found no assessment sustainable by special benefits could be made. The court, after finding most of the foregoing facts, made certain findings which we quote verbatim:

“(8) That at the present time Shilshole avenue and the water front streets lie at an average elevation of from three to five feet above city datum, the other streets in the districts sloping back at a gentle grade to the north; that the proposed improvement provides for a change of grade up to an average elevation of sixteen feet above city datum on the water front streets and running back at an easy grade to the north; that King county heretofore condemned the right to flood the streets and property up to an elevation of plus seven above city datum, so that by reason of the proposed improvement the streets will be brought approximately nine feet above the surface of the canal; that no special benefits are conferred on the property by reason of any increase of grade above that necessary to bring the surface of the streets slightly above the level of the water so as to put them in a dry and usable condition; that any increase of grade above such water level grade is not a special benefit to the abutting property; that all the special benefits conferred by this improvement are found solely in the fact that the surface of the streets are brought above the level of the water and made dry and usable instead of being left at their existing physical elevation and covered with water, and all of said special benefits would be equally conferred by any change of grade which would bring the streets above the flood line so as to change the same from a flooded condition to a dry and usable condition; that all of the property specially benefited is included in the district as established by the eminent domain commission.”

This finding was not excepted to by the city. In any event it is amply supported by the evidence. One of the commissioners testified:

"That it would make no difference in the benefits found whether the commission considered the streets at the existing elevation or just flush with the canal line, whether that be considered as being either seven or nine feet, because the streets would be equally unusable in any event; and therefore since the only benefit consists in bringing the streets up above the level of the water, so that the surface would be dry and usable, every possible benefit conferred by this improvement would have been conferred by simply bringing the streets a few inches or a half a foot above the canal line, which could have been done without the payment of the damages which we are here called upon to assess. The whole commission, being convinced of that fact, had frequent conferences with the city engineer's office to see why the grades were raised many feet beyond that point, but were unable to get any satisfactory reasons."

The other two commissioners testified to the same effect. There was no evidence to the contrary. The court also found:

"(6) That the damages awarded in this condemnation proceeding were occasioned by that portion of the change of grade necessary to bring the surface of the streets from a point slightly above the level of the water, the dry and usable condition, to the present grades as established herein, and said damages were allowed only for such increase of grade; that no damages were awarded for that portion of the change of grade from the existing physical elevations of the streets to a point slightly above the water level sufficient to bring the surface of the streets up above and out of the way of the water."

The city took no exception to this finding, and it also was amply supported by the evidence. The attorney for the city in the condemnation proceeding, and also in this proceeding, testified:

"That the city in the condemnation proceeding took the position, which was sustained, that no damages had to be paid for the raise of grade up to and above the canal level so as to bring the streets out of the way of the water because that damage had already been paid in the old King county

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condemnation suit; that therefore the only damages paid in this condemnation suit were for the raise of grade of the streets from that point up to the elevations established by said proceeding."

The court further found:

"(7) That the board of eminent domain commission in preparing the assessment roll herein have proceeded upon the theory that the city of Seattle had already acquired and had the right to raise the streets within this district to a plus nine city datum; that the court finds no special benefit would be conferred upon the property within the so called flood area by this proceeding if such right existed, because the actual flood line, as held by this court, is only seven feet above city datum, and that on the roll as prepared and now under consideration by the court the property within the so called flood area is assessed approximately \$150,000; that the commission found the special benefits to consist in the fact that the streets were changed from a flooded condition to a dry and usable condition, but that said commission proceeded upon the theory that said streets would be flooded to a depth of nine feet above city datum instead of seven feet above city datum as held by this court."

This finding, though not excepted to by the city, was excepted to by the contesting property owners. In any event, as we view the case, it is wholly immaterial in view of the prior findings of the court that no special benefits resulted from any increase of grade above that necessary to bring the surface of the streets slightly above the level of the water and in a dry and usable condition, and the further finding that the damages awarded in the condemnation proceedings were occasioned solely by that portion of the change of grade necessary to bring the surface of the street from a point slightly above the level of the water or a dry and usable condition, to the present established grade.

The court concluded as a matter of law:

"(1) That the city of Ballard was under no obligation, by reason of its receiving damages for the flooding of its streets, to readjust the same or to repair the damage so done; that the city of Seattle, as the successor of the city

of Ballard, obtained and assumed all of the rights and obligations of said city of Ballard, and that no duty is imposed upon said city of Seattle by reason of its receiving said damages for the flooding of the streets, to regrade or change the grade of said streets or to adjust them above the water level, or to take any steps to protect said streets from being and remaining in a flooded condition; that the city of Seattle, by and through the board of eminent domain commission, has authority and power to levy special assessments in this proceeding, which said assessments shall be commensurate with and shall not exceed the special benefits sustained by the property by reason of the change of the streets from a submerged condition to a dry and usable condition at the elevation herein established.

"(2) That the only right acquired in the streets by the judgment entered in the case of King County v. James R. Allan *et al.*, being cause No. —, was to flood said streets to an elevation of plus seven above city datum; that no new grade of the streets was established by reason of said condemnation judgment, and that no rights were acquired thereby to change the existing grade of the streets either up to a water level grade or to any other grade whatsoever; that the right acquired in this cause was to change the grade from existing elevations to the elevations established herein, and that benefits must be computed with reference to the streets as existing at their present elevation covered with, or subject to be covered with water up to an elevation of plus seven as contrasted with the grade of the streets as established by this proceeding, and that the property should be assessed upon that basis."

The court thereupon entered its order sustaining the right of the city to levy the assessment, but ordered that the roll be referred to the commissioners with instructions to make certain modifications in the assessments on such property as was considered by the commissioners as being flooded, on the theory that the waters of the canal would be raised to plus nine, but which would not be flooded if the waters were raised only to plus seven as held by the court. The contesting property owners have appealed, and the city has taken a cross-appeal.

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The appellants assigned as error the making of the court's conclusions of law and the entering of any judgment authorizing an assessment against their properties, on the ground that neither was sustained by the court's findings. The city, cross-appellant, assigns as error the making of the several findings of fact, and the entry of the order referring the roll for modification.

If the findings of the court are to be accorded the same force that findings are given in other proceedings, whether legal or equitable, tried by the court without a jury, it is obvious that the cross-appeal can only be considered as raising the question whether the findings support the order of reference for modification. The governing statute, Rem. & Bal. Code, § 7795 (P. C. 171 § 85), provides:

"On the hearing, the report of such commissioners shall be competent evidence and either party may introduce such other evidence as may tend to establish the right of the matter. The hearing shall be conducted as in other cases at law, tried by the court without a jury, and if it shall appear that the property of the objector is assessed more or less than it will be benefited, or more or less than its proportionate share of the costs of the improvement, the court shall so find, and also find, the amount in which said property ought to be assessed, and the judgment shall be entered accordingly."

The provision that the court shall take such evidence as "may tend to establish the right of the matter" would seem to indicate that the hearing is essentially an equitable proceeding, but the next provision that the hearing shall be conducted as in "other cases at law, tried by the court without a jury," seems to construe the proceedings as one at law. In any event, this statute expressly authorizes the court to make findings, and since the proceedings are, by express statutory direction, to be conducted as other cases tried by the court without a jury, the findings, when not excepted to, are binding on the parties, and hence cannot be disturbed by this court on appeal.

As has been repeatedly pointed out, this court in such cases is not a court of first instance, but purely a court of review. *In re West Wheeler Street*, ante p. 146, 147 Pac. 873; *Strelau v. Seattle*, ante p. 255, 147 Pac. 1144; *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279; *Seattle v. Sylvester-Cowen Inv. Co.*, 55 Wash. 659, 104 Pac. 1121. We have repeatedly held that in actions, whether equitable or legal, when the trial court makes complete findings they are binding on the parties in the absence of exceptions, and when not excepted to will be taken as true. *Hector v. Hector*, 51 Wash. 434, 99 Pac. 13; *Hoeschler v. Bascom*, 44 Wash. 673, 87 Pac. 943; *Washington Trust Co. v. Local & Long Distance Tel. Co.*, 73 Wash. 627, 132 Pac. 398; *Harbican v. Chamberlin*, 82 Wash. 556, 144 Pac. 717; *Corbitt v. Civil Service Commission of Seattle*, 33 Wash. 190, 73 Pac. 1116; *Shaw v. Benesh*, 37 Wash. 457, 79 Pac. 1007; *Cars- tens v. Alaska Steamship Co.*, 39 Wash. 229, 81 Pac. 691; *Metcalf v. Storey*, 80 Wash. 119, 141 Pac. 315.

The sole question presented therefore, both by the appellants' and cross-appellant's assignments of error, is whether the conclusions of law and judgment are supported by the findings.

I. The main contention of the appellant property owners is that the city having received compensation for the flooding of these streets in the old county condemnation suit, cannot assess the resulting damages for raising the grade of the streets against the abutting property. The city contends that, in contemplation of law, the property owners received pay in the old county condemnation for every damage to their property caused by the actual flooding of the property itself or the adjacent streets, and that the city only received compensation for the injury to its own interest, that is, the public easement in the streets; that both the property and the streets, immediately upon that condemnation, became potentially flooded to the depth of seven feet above datum, but that the grades, either actual or official, of the streets were

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not changed either physically or potentially. There is much force in the view that the potential condition which was then created, though surely necessitating some kind of an improvement by a change of grade, did not alter the legal relation either of the city or the abutting property to the streets or to each other in their relation to any future improvement of the streets, since the property owners had already received pay for the damage to their street access. We shall not, however, decide this question, since the view we take of the case in other particulars renders its decision unnecessary.

II. It is next contended that the raising of the grades being necessitated by a general public improvement, namely the construction of the Lake Washington Canal, as distinguished from a local improvement, the damages for the change of grade should be considered a part of the expense of the general improvement and should be borne by general taxation. This contention is basically unsound. Had the flooding of the streets been made for a city purpose and at the instance of the city, a different question would be presented. True, the streets are to be flooded for a public purpose, but it is a county purpose, not a city purpose. The resultant situation must, therefore, be treated exactly the same as if a public service corporation, a boom company, a canal company or a power company, had condemned both the easement of the city and the right of access of the owners of abutting property for the right to flood the streets for a public use. The authorities cited by the appellants in this connection are cases in which the city itself had damaged the streets and sought to assess the cost of restoration against the property owners. *City of Burlington v. Palmer*, 67 Iowa 681, 25 N. W. 877; *City of Philadelphia v. Henry*, 161 Pa. St. 38, 28 Atl. 946. The distinction from the case here seems too plain to require further comment.

III. It seems to us, however, that a third ground advanced by the appellant property owners as a reason why

their property should bear no part of the damages awarded for the change of grade here involved is clearly sound.

The findings of the trial court, as we have seen, must be taken as correct, since the city took no exceptions to them. They show conclusively that the property of the appellant owners cannot be assessed in this proceeding, and hence do not support, but rather negative, the court's conclusions of law. The findings conclusively show that there was no necessity for a condemnation to raise the grade to the height sufficient to confer every benefit upon the property of the appellants which can be conferred by a change of grade. This results from the finding "that the damages awarded in the condemnation proceeding were occasioned by that portion of the change of grade from a point slightly above the level of the water . . . to the present grades as established herein." That is to say, from about nine feet above city datum to about sixteen feet above city datum. See finding six above quoted.

The court also found that the added height above the level necessary to raise the streets slightly above water conferred no benefits upon the submerged property. See finding three above quoted.

The necessary result of these findings is that the flooded property is assessed by this roll to pay damages awarded for that part of the raise of grade which did not benefit it, and which were awarded for that part only. It is obvious that if these findings are correct, the two sections of this contemplated elevation of grade, namely (1) that part rising from datum to about nine feet above datum (which would produce a dry street just above the flood line), and (2) that part rising from this nine foot level above datum to about sixteen feet above datum (which produces a street about nine feet above the flood line) have no correlative effect upon the two classes of property affected by the improvement, namely (1) the property *damaged* and to pay damages to which the assessment is levied, and (2) the property *benefited* and as-

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sessed to pay those damages. The first part of this elevation up to nine feet above datum alone confers the benefit on the *benefited* property. The second part, from nine up to sixteen feet above datum, alone inflicted the damages on the *damaged* property. The vital point is this: *The thing which conferred the benefit on the one class of property did not inflict the damages on the other class.* It is clear, therefore, that to assess the property benefited to pay these damages is to assess it for something that had no relation to the benefits. The damages to the damaged property and the benefits to the benefited property have no more relation to each other than if they resulted from wholly different improvements.

The fact that the thing which damaged one class of property and the thing which benefited the other class are parts of the same improvement does not alter the case. A close analogy is presented in our decision in *In re Ninth Avenue etc., Seattle*, 79 Wash. 674, 141 Pac. 61. In that case part of the improvement was a change of grade necessitating a cut, the other part was the establishment of an original grade necessitating a fill. The condemnation was to pay damages to the property abutting on the cut caused by the lowering of the grade there. It was urged that the property abutting upon the fill, and which the fill alone put into access with Westlake avenue, the main arterial highway of the district, should be assessed the same as the property further south which acquired access to Westlake avenue through the cut. It was evident that the damages, for which alone the assessment was made, were caused by a thing, namely the cut, which benefited the property south of the fill very much, but benefited the property abutting the fill very little. In deciding that the assessment was properly made by assessing the larger amount to the property to the south and the smaller amount to the property abutting the fill, we said:

“On the question of relative benefits and distribution of cost, the disagreement of the witnesses for the protestants

among themselves was even more marked than their disagreement with the opinion of the commissioners as expressed in the roll. They agreed in but one thing. They were unanimous in the belief that the property north of Mercer street where the fill begins was benefited at least as much as that south of Mercer where the cut was made; but it is obvious that they all overlooked the fact that the cut, for which alone the condemnation was had, and to pay the damages for which alone the assessment was made, was of comparatively little benefit to the property to which the fill alone would furnish full access to Westlake avenue by a street eighty feet wide, on a level grade. They overlooked the fact that, with this perfect access to Westlake, this property was not vitally concerned in, nor greatly benefited by, a minimized grade on Ninth avenue further south. They failed to note the fact that it was the actual fill which mainly benefited the property north of Mercer street, not the change of grade further south, and that it was to pay the damages for the change of grade further south, not for the physical fill, that the assessment here in question was made. In fact, the map in evidence indicates that, from Mercer street north to the end of the improvement, the grade to which the fill was made was an original grade. These witnesses confounded the benefits from the physical fill, not concerned in this assessment, with the benefits from the change of grade further south to pay the damages for which, alone, the assessment was made. Had the assessment been made upon their theory, it would have been framed upon a fundamentally wrong basis and wholly indefensible."

Mutatis mutandis, this language applies with equal force to the case here. This assessment, being made against the property of these appellants to pay damages for a thing which did not benefit that property, was founded upon a fundamentally wrong basis and is wholly indefensible.

The city having failed to except to the court's findings on the question of benefits, presumably because it offered no evidence to the contrary, is compelled to fall back upon the untenable position that the declaration of the council in the ordinance initiating the improvement, that the cost of the

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condemnation should be paid "wholly by special assessment upon the property benefited" is, under the decision in *Spokane v. Curtiss*, 66 Wash. 555, 120 Pac. 70, final and conclusive that the property in the district was in fact benefited to the extent of the damages to pay which the assessment is intended. In that case, however, we merely held that no part of the damages can be assessed against the city by the eminent domain commission when the ordinance declares that the whole cost shall be assessed against the property benefited. We did not hold that such a declaration of the council is conclusive that the property is benefited, but only that the city cannot be assessed. As we said in the case of *In re Leary Avenue*, 77 Wash. 399, 138 Pac. 8, touching the *Curtiss* case:

"This, of course, would not authorize charging the specially benefited property beyond the benefits, but it would prevent the charging of any part of the cost against the city. Under such circumstances, the project might fail for inability to raise sufficient funds by the special assessment, because of lack of benefits, but that would not compel the city to contribute against its will."

It is the basic principle and the very life of the doctrine of special assessments that there can be no special assessment to pay for a thing which has conferred no special benefit upon the property assessed. To assess property for a thing which did not benefit it would be *pro tanto* the taking of private property for a public use without compensation, hence unconstitutional. Though the right to levy special assessments for local improvements is referable solely to the sovereign power of taxation, our state constitution, article 7, § 9, expressly limits its exercise to assessments of property benefited. It provides:

"The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited. . . ."

Rem. & Bal. Code, § 7790, provides, among other things, "that no property shall be assessed a greater amount than it will be actually benefited."

In *In re Fifth Avenue and Fifth Avenue South*, 66 Wash. 327, 330, 119 Pac. 852, we said:

"It will be obvious to any one who reads the special assessment statutes that it was the intent of the legislature to permit the assessment of only such property as was specially benefited (§ 7790), and that general benefits could not be made the basis of a levy. . . . it will be seen that it is the duty of the court to inquire whether the property is assessed more or less than it is specially benefited, and unless there is a special benefit the court has no jurisdiction to order its inclusion in the roll."

See, also, *Aumiller v. North Yakima*, 73 Wash. 96, 131 Pac. 470; *State ex rel. Murphy v. Wright*, 76 Wash. 383, 136 Pac. 482; Page & Jones, *Taxation by Assessment*, p. 199, § 118; p. 441, § 284; Dillon, *Municipal Corporations* (5th ed.), § 1440; *Haggart v. Alton*, 29 S. D. 509, 137 N. W. 372; *Sears v. Street Commissioners of Boston*, 173 Mass. 350, 53 N. E. 876; *Ferguson v. Borough of Stamford*, 60 Conn. 432, 22 Atl. 782; *Northwestern University v. Wilmette*, 230 Ill. 80, 82 N. E. 615; *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; *Rogers v. St. Paul*, 22 Minn. 494; *Morewood Avenue, Chamber's Appeal*, 159 Pa. St. 20, 28 Atl. 123, 132.

The fact that the property of these appellants has, under the evidence and the findings of the trial court, demonstrably received no benefit whatever from that part of the change of grade, to pay the damages occasioned by which the assessment was made, compels the conclusion that the assessments against the property concerning which this appeal was taken must be cancelled. It does not appear that all of the property owners in the district have appealed, but this decision, of course, only affects the property of the parties who have appealed. As stated in *Seattle v. Sylvester-Cowen Inv. Co.*,

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supra, "the final judgment of the lower court is conclusive upon all who are content to accept it."

See, also, *In re Westlake Avenue, Seattle, In re West Wheeler Street*, and *Strelau v. Seattle, supra*.

The judgment as to these appellants is reversed, and the case is remanded with direction to cancel the assessments against their property.

MOUNT, MAIN, CROW, and FULLERTON, JJ., concur.

[No. 12283. Department One. May 20, 1915.]

F. R. DUARTE, *Plaintiff*, v. A. MINNICK *et al.*, *Defendants*,
NATIONAL BANK OF COMMERCE, *Petitioner and*
Appellant.¹

SALES—CONDITIONAL SALES—NATURE OF SELLER'S INTEREST—ASSIGNMENT OF CONTRACT—RIGHTS OF ASSIGNEE. The seller of goods under a conditional sales contract retains the absolute title thereto, subject to be defeated by the payment of whatever balance is due upon the agreed purchase price; hence an assignment of the contract to a third party which had been advancing to the vendee the sums due on the contract, purporting to transfer all the interest that the vendor "has ever had in the property," would operate to pass no more than the vendor's defeasible interest for the balance due, which would be extinguished on payment of such balance to the assignee.

SUBROGATION—ASSIGNMENT OF CONDITIONAL SALES CONTRACT—RIGHTS OF ASSIGNEE. The mere fact that a bank advanced sums of money from time to time as loans to aid a company in making payments on machinery under a conditional sales contract, under an indefinite and uncertain agreement that the bank should have security thereon, which was never consummated in any way, and that the bank finally paid off the balance due on the machinery, receiving an assignment of the conditional sale contract, would not entitle it to be subrogated to the rights of the conditional sales vendor or give it greater rights than those of an unsecured creditor.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 22, 1914, denying the

¹Reported in 148 Pac. 600.

right of a creditor as a preferred claimant to property in the hands of a receiver, after a trial to the court. Affirmed.

Cannon, Ferris & Swan and *Walter A. White*, for appellant.

Hibschman & Dill and *Belden & Losey*, for respondent.

PARKER, J.—The National Bank of Commerce of Spokane seeks to be adjudged a preferred claimant to certain funds which are the proceeds of the sale of certain cold storage machinery, made by the receiver of the Northwestern Cold Storage & Warehouse Company, a receiver having been appointed by the superior court in the above entitled action of *Duarte v. Minnick et al.*, involving the insolvency of that company. The superior court having denied the relief petitioned for by the bank, it has appealed therefrom to this court.

On March 24, 1910, the Armstrong Machinery Company entered into a conditional sale contract with the Cold Storage Company for the sale of machinery for the plant then being constructed by the Cold Storage Company. This contract provided for payments to be made on the machinery from time to time as furnished, and that the title to the machinery so furnished should remain in the Armstrong Machinery Company until it was fully paid for. In our present discussion we assume that this contract was timely placed of record in the office of the auditor of Spokane county. This machinery passed into hands of the receiver with other property of the Cold Storage Company after the completion of the plant, and was thereafter, by consent of the bank, sold by the receiver, with the understanding that the bank's claim to the proceeds of the sale should be of the same legal effect as its claim to the property theretofore made. There is now in the hands of the receiver, as the net proceeds of the sale of the machinery, the sum of \$4,608.91. The bank claims this money, as it also had claimed the machinery conveyed by the conditional sale contract, by virtue of an assignment made

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to it by the Armstrong Machinery Company of its interest therein under the conditional sale contract. The extent of the interest so acquired by the bank, and whether or not the title to the machinery became perfected in the cold storage company and its receiver by the bank receiving the full amount due it under the conditional sale contract, are the questions here to be answered.

It is contended by counsel for the bank that it has succeeded to all the rights which the Armstrong Machinery Company had in the machinery before any of the purchase price of over \$9,000 had been paid to it thereon, as well as to all the rights of that company existing at the time of the formal assignment made by it to the bank when there was a balance due upon the purchase price of the machinery to that company of only \$964.76, which sum was then paid by the bank to the Armstrong Machinery Company, and which sum, with interest thereon, was thereafter voluntarily paid by the receiver to the bank upon order of the court granting him permission so to do. Counsel for the bank proceed in their contention upon the theory that it has become subrogated to all the rights the Armstrong Machinery Company ever had, by virtue of having advanced to the Cold Storage Company from time to time sums aggregating \$9,000 to make payments on the machinery as they fell due under the conditional sale contract, all of which it is insisted was done in compliance with an agreement and understanding that the bank should be secured by the conditional sale contract to the same extent as the Armstrong Machinery Company was secured thereby. No such understanding is evidenced in writing, but it is sought to be proven by the testimony of the president and vice president of the bank. The president of the bank testified upon the hearing before the court as follows:

"Q. Just state to the court please the nature of the transactions that the bank had with the Armstrong Machinery Company and the Cold Storage Company? A. Mr. Min-

nick [the manager of the Cold Storage Company] came to us in the spring, I think it was, of 1910, saying that he was going to put up a cold storage plant, that he had made arrangements with the Armstrong Machinery Company for the plant to cost eighteen or twenty thousand dollars, or something in that neighborhood. That he had turned over to them, I think it was some notes that he had, which he claimed would pay for half of the plant at least, and asked us if we would advance the balance of the money to complete the plant, that he considered that the plant would amply secure us for the money that we put into it, and we agreed to it. Q. And under that agreement did you advance any money to the Armstrong Machinery Company? A. Yes, sir. Q. And what was the amount that the bank advanced to the Armstrong Machinery Company? A. Well, it was something over nine thousand dollars. Q. And has that amount ever been paid? A. No, sir. Q. Repaid to the bank? A. No, sir. Q. And what security was the bank to have for this money that was advanced? A. We would have the security on this plant; we were to have a chattel mortgage or bill of sale, or an assignment of the Armstrong Machinery Company's security. That plant was to secure us for our money. . . . Q. What was the manner of paying the Armstrong Machinery Company? Was the check given direct to the Armstrong Machinery Company, or the money given to the Cold Storage Company? A. I think the money was to be given to Mr. Minnick, and we telephoned down to the Armstrong Machinery Company and saw that they got the money. Q. The money probably then was subject to Minnick's check? A. Yes, sir. Q. And you tried to see that he gave the check to the Armstrong Machinery Company as you advanced the money? A. Yes, sir, it has to be done that way to be legal, Mr. Hibschan. Q. Well, that is for the court to determine. A. Well, I might say that the National Bank Examiner, when a man gives up a note, we have to credit that amount to his account. Q. Then you took Mr. Minnick's note each time, did you? A. Yes, sir. Q. For each amount as you advanced it? A. Practically. Q. Do you know whether that was Minnick's note or the note of the Cold Storage Company which you would take? A. Well, I think it was Mr. Minnick's; it might have been both, I would not say."

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The testimony of the vice president of the bank is substantially the same, so far as here material, as that of the president above quoted. On December 19, 1910, the bank advanced the sum of \$964.76, being the balance due the Armstrong Machinery Company on the conditional sale contract, and then received a formal written assignment of the rights of the Armstrong Machinery Company thereunder, which written assignment purported to convey to the bank "all interest that said Armstrong Machinery Company of Spokane, Washington, has or ever had in the property. . . ." It is not clear from the record before us whether this final balance due under the conditional sale contract was paid by the bank directly to the Armstrong Machinery Company or was paid by the bank to the Cold Storage Company, but it is, in any event, clear that the advancement of this money by the bank, payment thereof to the Armstrong Machinery Company, and the making of the assignment by the Armstrong Machinery Company to the bank constituted a single transaction. This assignment constitutes the only written evidence of the bank's succeeding to the rights of the Armstrong Machinery Company. The foregoing summary of the facts, is, we think, as favorable to the bank's contentions as the record admits of.

We are unable to concur in the view that the bank acquired any interest whatever in the machinery conveyed by the conditional sale contract until it received the assignment from the Armstrong Machinery Company of its title to the machinery. Until that time, the title to the machinery was in the Armstrong Machinery Company. That company did not have a mere lien upon the machinery securing the payment of the unpaid portion of the agreed purchase price, but it possessed absolute title thereto, subject to be defeated by the payment of whatever balance was due upon the agreed purchase price. As said by us in *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817, 37 L. R. A. (N. S.) 71:

"The title, which is by this contract reserved in the seller, is the absolute title, under which he may retake the property, if at all, and retain it without any obligation whatever to account therefor, or for any surplus of the value thereof above the unpaid purchase price, to the purchaser. The thing which our law recognizes as being retained by the seller under this contract is not a mere lien or equity securing the balance of the purchase price, but the absolute title, which remains in him or passes from him to the purchaser absolutely, accordingly as the conditions of the sale are broken, or as they are fulfilled."

Of course the bank acquired the defeasible title to the Armstrong Machinery Company by the assignment, but it acquired by that assignment only the title of the Armstrong Machinery Company as that title then existed and was subject to be defeated by the payment of the balance of the agreed purchase price, which was then, as we have noticed, only \$964.76, which sum with interest was thereafter paid in full to the bank by the receiver. This, it seems to us, as completely perfected the title of the receiver, the successor in interest of the Cold Storage Company, as if that payment had been made by the receiver directly to the Armstrong Machinery Company in the absence of an assignment to the bank. Nor do we think that the language of the assignment purporting to convey other than the Armstrong Machinery Company's present interest aids the bank in its claims here made. The bank may have had some understanding with the Cold Storage Company that security was to be given to it in the form of "a chattel mortgage or bill of sale, or an assignment of the Armstrong Machinery Company's security," but the fact is that no such security was given until the assignment was made by the Armstrong Machinery Company to the bank when only \$964.76 was due it upon the conditional sale contract. The bank took the title to the machinery subject to having the title defeated by the payment to it of this sum, which was thereafter paid to it.

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The claimed agreement existing between the bank and the Cold Storage Company, even though regarded as being acquiesced in by the Armstrong Machinery Company, is, it seems to us, too indefinite and uncertain to support the claims of the bank here made. It will be noticed from the testimony of the president of the bank, above quoted, that the sums advanced by the bank prior to the final payment when the assignment was made by the Armstrong Machinery Company to it, were advanced as loans by the bank to the Cold Storage Company or Minnick, its manager, or probably both, and that notes were actually executed therefor, manifestly with a view on the part of the bank officers, as expressed by the president in his above quoted testimony, to have it "done that way to be legal," no doubt having in mind that a national bank was required to make such advances as loans and not as a purchaser acquiring the right of a seller under a conditional sale contract. In other words, it manifestly was regarded as necessary to put the matter in this form rather than for the bank to become in effect a purchaser of personal property. It is indeed difficult to see upon what theory the bank's claim is here made to rest, other than that it, by this loose arrangement, became the owner of the legal title to this machinery at all times after the making of this claimed agreement and the bank's first advance thereunder, subject only to the title of the Armstrong Machinery Company. We have already noticed that this machinery never legally stood as *security for the payment of a debt*. The title thereto was in the Armstrong Machinery Company and the bank, its successor in interest, and after assignment by it to the bank, was subject to be defeated by the payment of the balance due on the purchase price agreed upon in the conditional sale contract, which was then only \$964.76.

We conclude that the bank's defeasible title to the machinery passed absolutely to the receiver upon the payment to it of the balance due upon the purchase price specified in

the conditional sale contract, just as the title of the Armstrong Machinery Company would have so passed to the receiver had such payment been made to it. The rights of the bank here involved are no more than those of an unsecured creditor. It never had any lien of any nature upon the machinery. That it possessed a legal defeasible title at one time is of no consequence now, since that title has been defeated by full payment of the purchase price specified in the conditional sale contract upon which it rested.

The judgment is affirmed.

MORRIS, C. J., CHADWICK, MOUNT, and HOLCOMB, JJ., concur.

[No. 12458. Department One. May 20, 1915.]

J. OSCAR PETERSON, *Administrator etc., Respondent*, v.

CLARA M. TULL *et al.*, *Appellants*.¹

EXECUTORS AND ADMINISTRATORS—FRAUDULENT CONVEYANCE—SUIT TO SET ASIDE—COMPLAINT—SUFFICIENCY. In an action by an administrator to set aside a transfer of his intestate as in fraud of creditors, it is unnecessary that the complaint allege the names of creditors who would be defrauded by reason of such transfer, where it appears that the estate was insolvent.

FRAUDULENT CONVEYANCES—EQUITABLE TITLE. Where the legal title to property is placed in one and the equitable title remains in the grantor, it is immaterial whether deeds back to the grantor were ever delivered, since equity will lodge the title where in truth it should be.

APPEAL AND ERROR — HARMLESS ERROR — ADMISSION OF EVIDENCE. Testimony of an attorney as to what one of the parties testified to in another case would not be prejudicial error when the same fact is shown by other evidence.

FRAUDULENT CONVEYANCES—ACTION—EVIDENCE. In an action to set aside fraudulent conveyances, evidence is admissible that the fraudulent grantee had testified in another action against her that she had executed a deed back to her grantor.

¹Reported in 148 Pac. 598.

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SAME—BONA FIDE PURCHASERS—SUFFICIENCY OF EVIDENCE. A finding that a grantee is not a purchaser for value and in good faith is sustained although he denied knowledge of the conditions existing, where it appears that the holder of the legal title quitclaimed to him for one dollar, and the circumstances and the evidence of an attorney indicated that he had notice of the equitable title, paid no consideration, and his evidence was evasive and improbable.

SAME—BONA FIDE PURCHASERS—EVIDENCE. In an action to set aside a deed as a fraudulent conveyance, it was not error to permit counsel for the adverse party to interrogate the grantee as to what he paid for the property, when the only objection made was that the testimony was incompetent, irrelevant and immaterial.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered April 28, 1914, in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

John C. Kleber, Fred R. Wright, and C. T. McDonald, for appellants.

Merritt, Oswald & Merritt, for respondent.

CHADWICK, J.—E. A. Oliver and Florence A. Oliver, his wife, deceased, were the owners in their lifetime of lots 1, 2, 3, and 4, block 112, Fourth addition to Railroad addition, Spokane, Washington. On the 3d day of January, 1907, the Olivers, being deeply involved in debt, conveyed these four lots to Mrs. Oliver's sister, Clara M. Tull, for a recited consideration of one dollar and other valuable considerations. There was in fact no consideration, and the only object of the conveyance was to put the property beyond the reach of the creditors of the Olivers. On January 31, 1908, the Fidelity & Deposit Company of Maryland commenced an action against the Olivers and Mrs. Tull, the object of which was to make the property so conveyed responsive to a judgment. In that case it was held that the deed was made to defraud creditors, and a judgment in the sum of \$8,537.20 was rendered. Thereafter Mrs. Tull sold a part of lots 3 and 4 for enough to pay the judgment. There remained in her name lots 1 and 2 and fifty feet off the south side of

lots 3 and 4. Mrs. Mabel Grovenor was the administratrix of the estate of the Olivers, and so continued until October 3, 1913, when she was removed.

On December 19, 1913, J. Oscar Peterson was appointed administrator *de bonis non*. Mrs. Grovenor, when acting as administratrix, caused all of the property last above described to be inventoried as the estate of her brother. The mother of Mrs. Oliver also brought a suit against the administratrix and all parties interested, setting up the claim that lots 1 and 2 had been, and were, the separate property of Mrs. Oliver, and that she was the sole heir of Mrs. Oliver. The court so decreed. In that case Mrs. Tull testified as a witness that she had signed a deed reconveying the property to the Olivers. This fact was also testified to by the attorney who drew the deed. It is doubtful whether this deed was ever delivered. Thereafter it occurred to the attorney, who seemed to be acting for both the administratrix and Mrs. Tull, that a deed signed by the wife alone would not be sufficiently formal to pass the title without suspicion of a community interest in her husband. He accordingly drew a deed to be signed by Mr. and Mrs. Tull. This he gave to Mr. Oliver, who returned it to him with their signatures upon it. The attorney, and those who are interested in sustaining the interest of appellants, testified that it was understood that the Tulls were to go to the office of the attorney and there acknowledge the deed. It is likely that they never did so. Mr. and Mrs. Tull thereafter made a quitclaim deed in favor of A. D. Grovenor, the husband of the former administratrix of the estate, for a recited consideration of one dollar. The respondent administrator thereupon brought suit to set aside the conveyance to Grovenor and make the lots subject to the debts and expenses of the estate of the Olivers, it being alleged that it was necessary to so charge the property, there being no personal property out of which to meet the expenses of the administration and existing debts. The court below made no findings of fact, but decreed that

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the defendants had no right, title or interest in any of the property, and accordingly quieted title thereto in the plaintiff as against the defendants and all persons claiming by, through or under them.

Appellants first contend that a motion to make the complaint more definite and certain and a demurrer to the complaint should have been sustained. We shall not discuss these assignments other than to say that we think it was unnecessary for the plaintiff to allege the names of creditors who would have been defrauded by the transfers. Plaintiff sued as administrator, and the allegation that there is a deficiency in the amount of money necessary to pay the claims against said estate was sufficient to pass the complaint over a motion to make more definite and certain and a demurrer, where the case has been tried on its merits. Under repeated rulings of this court, we will regard such assignments as technical objections and consider only the merits of the case.

The real contention of the appellants is that the deed by Mrs. Tull and her husband was never delivered, that title remained in Mrs. Tull, and that A. D. Grovenor was a purchaser in good faith for value and without notice of any superior equities. Many cases are cited to sustain the contention that a delivery of a deed must be clearly and satisfactorily proved, and that creditors cannot maintain an action to set aside conveyances as to it unless it is alleged and proven that there is no other property out of which the debt can be paid. It seems to us that these contentions are not well founded. The rules relied upon are well established and have been frequently asserted by this court. The real question in this case strikes deeper and rests upon an entirely different principle. The first consideration is, not whether Mrs. Tull conveyed the property in fraud of creditors, but whether she ever had title to the property, and if so, what was the extent and character of that title. The Olivers placed the legal title in her. That the equitable title remained in the Olivers there can be no doubt. It follows, then, that it is entirely

immaterial whether the deeds executed by Mrs. Tull and her husband were ever delivered. Equity will define and lodge the title where in truth it should be, whether any deeds were executed, formally or informally or were delivered or not delivered. The execution and delivery of instruments, when considered in a case of this kind, are not considered for the purpose of making a chain of title, but as circumstances bearing upon the equities of the case. They are declarations against interest.

There being no real controversy sustainable by any fact or inference of fact to be drawn from the record that Mrs. Tull ever had title to this property, the conclusion is inevitable that the Tulls and Mrs. Grovenor have no interest in the property, and therefore no interest in the defense of this case.

The attorneys in the case brought by Mrs. Oliver's mother were called as witnesses in this case, and testified that Mrs. Tull there testified that she had executed the deeds to which we have referred. This is assigned as error. It was not error, but if it were, the fact is shown by independent evidence and it would not be prejudicial.

The only question remaining is whether A. D. Grovenor was a purchaser for value and in good faith. This is a question of fact. Although he denied that he had any knowledge of the conditions existing, or that the property was in fact the property of the Olivers, or that he knew of the admitted knowledge of his wife, who acted as administratrix, the trial judge, in reliance upon the general circumstances of the case and the testimony of one of the attorneys for the parties in the suit brought by the mother of Mrs. Oliver that he had talked the matter over with Mr. Grovenor, held that he did have such knowledge.

It is contended that the court erred in allowing respondent's counsel to ask appellant A. D. Grovenor what he paid for the property. This contention is not sustained by any pertinent authority, nor do we think it could be so sustained.

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Syllabus.

Whether Grovenor bought the property without notice that the equitable title was in the Olivers and for value is the real issue in the case. The only objection made was that the testimony was incompetent, irrelevant and immaterial, not that it was improper cross-examination. The evidence was not incompetent, irrelevant or immaterial. Moreover, we have carefully read the testimony of appellant A. D. Grovenor and are satisfied that he never paid any consideration whatever for the property. His testimony is evasive and contradictory and altogether improbable.

The decree is supported by a preponderance of the evidence.

Affirmed.

MORRIS, C. J., PARKER, MOUNT, and HOLCOMB, JJ., concur.

[No. 12302. Department Two. May 22, 1915.]

MARTINA JOHNSTON, *Respondent*, v. SEATTLE TAXICAB & TRANSFER COMPANY *et al.*, *Appellants*.¹

APPEAL AND ERROR—NOTICE OF APPEAL—NOTICE BY CODEFENDANTS. A codefendant, similarly affected by the judgment, must join in the appeal or take an independent appeal within ten days after notice of appeal, as required by Rem. & Bal. Code, § 1720.

MASTER AND SERVANT — INDEPENDENT CONTRACTOR — LIABILITY OF PRINCIPAL. A subcontractor sustains the relation of an independent contractor, for whose negligence in injuring third persons the principal contractor would not be liable, where he was employed by a building company to do the excavation work necessary for the construction of a building, no control was exercised over the manner of doing the work, he used his own equipment, employed and paid his own men, and the work was not so intrinsically dangerous as to probably result in injuries to third persons, and a reservation by the employer of the right to supervise the work for the purpose of determining whether it is being done in accordance with the contract does not affect the independence of the relation.

¹Reported in 148 Pac. 900.

SAME—RELATION—INDEPENDENT CONTRACTOR—NEGLIGENCE—PARTIES LIABLE. A superintendent employed by a building company, whose duties did not begin until after excavation therefor was completed, is not liable for injuries received by reason of the negligence of a subcontractor in doing the excavation work.

MUNICIPAL CORPORATIONS—OBSTRUCTIONS IN STREET—PERSONAL INJURIES—PROXIMATE CAUSE. In an action for injuries by a passenger in a taxicab when it collided with a drag unlawfully used in the street by a building contractor without any permit, the question of whether the unlawful use of the drag was the proximate cause of the injury was for the jury.

TRIAL—MISCONDUCT OF COUNSEL—IMPROPER ARGUMENT. Where the argument of counsel transgresses the bounds of propriety by seeking to inflame the minds of the jury against a defendant corporation, and urging that, in order to hold the corporation, they must find against a certain other defendant, it is prejudicial to the latter defendant; and the refusal of the court to interfere when requested, or to instruct the jury to disregard the remarks of counsel, possibly leading the jury to believe the court indorsed the statements, tended to enhance the prejudice.

Appeal from a judgment of the superior court for King county, Humphries, J., entered April 13, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through an obstruction in a street. Affirmed in part and reversed in part.

Brightman, Halverstadt & Tennant, for appellant Seattle Taxicab & Transfer Company.

John W. Roberts and *George L. Spirk*, for appellants Puget Sound Bridge & Dredging Company *et al.*

McCafferty, Robinson & Godfrey, for respondent.

MAIN, J.—The purpose of this action was to recover damages for personal injuries alleged to be due to the negligence of the defendants. In the original complaint the Seattle Taxicab & Transfer Company, a corporation, and Frederick M. Gribble and wife, were made defendants. Subsequently, upon motion of the Taxicab Company, A. C. Goerig and wife, and the Puget Sound Bridge & Dredging Company, a corporation, were made defendants. The cause was tried to

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the court and a jury. A verdict was returned in favor of the plaintiff and against all of the defendants. Motion for a new trial being made and overruled, the defendants appeal.

The facts, so far as necessary to an understanding of the questions presented upon this appeal, are, in substance, as follows: On January 1, 1913, the Elks Investment & Construction Company, a corporation, being then the owner of a lot at the southwest corner of Fourth avenue and Spring street, in Seattle, contracted with the Puget Sound Bridge & Dredging Company for the erection of a building thereon. This contract provided that the building should be constructed according to the plans and specifications prepared by the architect for the Elks Investment & Construction Company. It also provided that the work was to be done under "the direction of the authorized representative of the owner, who shall be denominated herein as superintendent or architect." The bridge company contracted with one A. C. Goerig to do "all the excavating for the Elks building located on the southwest corner of Fourth avenue and Spring street, in the city of Seattle, Washington." The excavation was to be done according to the plans and specifications prepared by the Elks Investment & Construction Company. The work was to be done "satisfactory to the superintendent in charge and the party of the second part (the bridge company)."

After this contract had been entered into, Goerig entered upon the performance of the work called for by the contract. The dirt was removed by means of teams and wagons. When a wagon was loaded, it would come out on Spring street at the alley, which was equidistant from Fourth and Third avenues, Spring street extending east and west. Third and Fourth avenues were at right angles to Spring street. The grade of Spring street from Third to Fourth avenue is about 18 per cent. This street, between the avenues mentioned, is paved with granite blocks. The grade of Spring street being very heavy, a team of horses was unable to hold back a wagon loaded with dirt as it descended from the alley to

Third avenue. For the purpose of aiding the teams in holding back the loaded wagons during their descent of this grade, Goerig devised a counterweight, which consisted of a pulley placed in a post at the alley corner, a 3-8 inch cable, and a sled or drag, about four feet square, loaded with rock. The cable passed through the pulley. Upon one end of it was a hook. The other end was attached to the sled. On the opposite side of the sled to the one where the cable was attached, there was a short cable, a few feet in length, with a hook on the end. When a loaded wagon would come out of the lot to the alley corner, the hook at the end of the short cable would be attached to the rear end of the wagon. The team pulling the loaded wagon would then start down the hill, and the sled would drag behind the wagon. The direction taken was from the alley corner to the northwest corner of the intersection of Spring street with Third avenue. When the team and wagon reached this latter point, the sled was detached from the wagon. The grade from there on was comparatively level. When the next loaded wagon would start down, the hook attached to the long cable would be made fast to the rear end of the wagon, and as it descended, the sled would be dragged up to the alley corner. This operation was repeated as the work progressed, one loaded wagon pulling the sled down, and another pulling it up. In each instance the sled operated as a brake, or counterweight to hold back the loaded wagon as it descended the grade. When the drag was not in use, it was taken from the street and placed inside the area excavated.

On the morning of February 18, 1913, while the work of excavating was in progress, the plaintiff employed the taxicab company to convey her in one of its vehicles from her home to her office in the Burke building. In making this trip, the driver of the taxicab, instead of going two blocks further to the north where there was a comparatively level street, attempted to go down Spring street from Fourth to Third avenue. The pavement was wet and slippery. The

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taxicab was not equipped with either chains or non-skid tires. After the taxicab left the west margin of Fourth avenue, and before it reached the alley between that avenue and Third avenue, it began to skid, and continued to skid for a distance of from 120 to 150 feet. While skidding it passed over the cable attached to the drag, at a point about the center of the street and about the middle of the cable. The cable extended at that time from the alley corner in a northwesterly direction to near the northwest corner of the intersection of Third avenue with Spring street. The sled at this time was located about two feet from the curb on the north side of Spring street and close to Third avenue. The taxicab, from the point where it began to skid, continued in its uncontrolled descent until it collided with the sled at the point above mentioned. From this collision, the plaintiff sustained injuries for which she brought the present action.

Upon the trial in the superior court, at the conclusion of the plaintiff's evidence, each of the defendants moved for a nonsuit. These motions were denied. At the conclusion of all of the evidence, the defendants challenged the sufficiency thereof to sustain a verdict, and moved for a directed verdict. The request for a directed verdict was denied as to all of the defendants. The cause was submitted to the jury and a verdict returned for the plaintiff in the sum of \$3,000. As already stated, from the judgment entered upon this verdict, all of the defendants have appealed.

The respondent opens her brief with a motion to dismiss the appeal and affirm the judgment as to the taxicab company. The facts pertinent to this motion are these: The judgment against the defendants was entered on April 13, 1914. On June 6 thereafter, the bridge company, Gribble and wife, and Goerig and wife appealed from this judgment by giving notice of appeal and serving the same upon the respondent's attorneys, and the attorneys for the taxicab company. On the same day a cost and supersedeas bond on behalf of the bridge company and Gribble and wife was filed,

and a cost bond on behalf of Goerig and wife. On July 3, the taxicab company sought to perfect an independent appeal by serving and filing a notice thereof, and on July 8, thereafter, filed a cost and supersedeas bond. From these facts it is apparent that more than ten days had elapsed after the notice of appeal by the other appellants had been served upon the attorneys for the taxicab company before that company served its independent notice of appeal. Under the statute, Rem. & Bal. Code, § 1720 (P. C. 81 § 1191), it was necessary that the taxicab company serve its notice of appeal within ten days after it had been served with the notices of the other appellants. Failure to meet this requirement of the statute makes it necessary that the motion to dismiss the appeal and affirm the judgment be granted. *Griffith v. Seattle Nat. Bank Building Co.*, 16 Wash. 329, 47 Pac. 749; *Peck v. Peck*, 76 Wash. 548, 137 Pac. 137.

Upon the merits, as to the bridge company, the first question is, whether the contract of that company with Goerig for excavating constituted the latter an independent contractor. The general rule is that an independent contractor is one who renders services to another in the course of an independent occupation, representing the will of his employer only as to the result of the work and not as to the means by which it is accomplished; the chief consideration being that the employer has no right to control as to the mode or manner of doing the work; but a reservation by the employer of the right to supervise the work for the purpose of determining whether it is being done in accordance with the contract does not affect the independence of the relation. *Larson v. American Bridge Co.*, 40 Wash. 224, 82 Pac. 294, 111 Am. St. 904; *Seattle Lighting Co. v. Hawley*, 54 Wash. 137, 103 Pac. 6; *Cary v. Sparkman & McLean Co.*, 62 Wash. 363, 113 Pac. 1093; *Glover v. Richardson & Elmer Co.*, 64 Wash. 403, 116 Pac. 861; *Simila v. Northwestern Imp. Co.*, 73 Wash. 285, 131 Pac. 831.

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Under the rule stated, there can be no question but that Goerig was an independent contractor. The work was done by Goerig with his own wagons, teams, and equipment. He employed his own men and paid them with his own checks. The bridge company exercised no control whatever over the manner of doing the work. The only part which it had after letting the contract was to pay Goerig for the work done. Goerig was responsible to the bridge company alone for the result of the work and not for the manner in which it was performed. Where the act complained of was that of an independent contractor, his employer is not liable for such act unless the facts of the case bring it within one of the exceptions to the rule of nonliability. One of the exceptions to the rule of nonliability is that a party cannot evade responsibility by placing an independent contractor in charge of the work, where the work to be done is inherently or intrinsically dangerous in itself and will necessarily or probably result in injury to third persons unless measures are adopted by which such consequences may be prevented. *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310; *Freebury v. Chicago, Milwaukee & Puget Sound R. Co.*, 77 Wash. 464, 137 Pac. 1044.

The act of placing the drag in the street did not relate to the act of performance of the work contracted for, but it did relate to the manner of its performance. The work contracted for was not inherently or intrinsically dangerous, and was not such as would necessarily or probably result in injuries to third persons unless measures were adopted by which such consequences could be avoided.

As to Gribble and wife, the record is silent so far as any evidence may be concerned that would sustain a judgment as against them. Gribble was employed by the bridge company for the purpose of superintending the construction of the building. He had nothing to do with the excavation, and at no time gave Goerig any directions or suggestions as to the manner of doing the work. His duties did not begin

until after the excavation had been completed and the constructive work of the building was begun.

As to Goerig and wife, the record presents a question of fact for the jury, at least in a suit where the plaintiff was merely a passenger in a taxicab at the time of the accident. We express no opinion upon the question were the suit by the taxicab company against Goerig. Goerig had not obtained from the city, as required by the ordinances thereof, a permit for the use of this drag in the street. In the absence of such a permit, the use of the drag in the street in the manner described was not lawful. The taxicab having collided with the sled while it was being used without a permit, would present the question whether the drag was the proximate cause of the injury, and this was for the jury to determine under proper instructions.

Many errors are assigned which it is claimed call for a reversal of the judgment. But one of these need be noticed. During the argument to the jury, counsel for the respondent, over the objection and exception of counsel for all of the defendants except the taxicab company, used this language:

"His Honor, Judge Humphries, is noted as one of the ablest judges in the state, and Mr. Roberts tried to convince him that there was no case against his corporation, and Judge Humphries, notwithstanding the persistent argument by Mr. Roberts, held against him. His Honor said, notwithstanding that this man Roberts argued to the court with all his ability and persistency, that the defendants represented by him, including the corporation, were not liable, that nevertheless, the case against the Puget Sound Bridge & Dredging Company should not be dismissed."

Also,

"This man Roberts talks a good deal about poor Goerig, but he cares no more for Goerig than the dirt under his feet. He is here trying to get out this big corporation that he represents. That's what he is hired for. He is trying to fool you by praying for sympathy for poor Goerig, but I

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want to warn you that if you don't find against Goerig and Gribble, you can't find against his corporation. You have heard all this testimony, and it is for you to say, after hearing it all, and considering it all, from every point of view, whether or not Goerig is liable for any negligence that has occurred, and if he is, then the bridge company is liable, and you must hold both in order to hold either. One must be held in order to hold the other. The object of Mr. Roberts, and the purpose of his sympathy, of course, all the way through is to get up sympathy for Goerig in order to save him, and, in that way, save his company. He don't, as I said before, if you will excuse a further repetition, he does not care a snap about Goerig, or his wife, or his children. That is of the slightest possible account to John Roberts. It is the big, big, big, company that he represents, that he is looking after, and if he saves one, he saves the other. Now, watch it. Keep it in your mind. You are the judges of all the facts, and it is for you to say who is to be held."

Prior to the time when these remarks were made, the same counsel had objected to the remarks made in behalf of the taxicab company. In response to this objection, the court said:

"I can't limit all your argument. You have a right to explain things."

The argument, the tenor of which is shown by the excerpts quoted, transgresses the bounds of propriety, and was prejudicial to Goerig and wife. The purpose, apparently, was to first inflame and prejudice the minds of the jury against the bridge company, and then tell the jury that they must hold Goerig and wife, otherwise this "big, big, big" corporation would be released. Goerig and wife had a right to have their case submitted to the jury upon its merits. What the effect of a verdict for or against these particular defendants might have upon any of the other defendants was no concern of the jury. The noninterference of the court when the request was made that the jury be instructed to disregard the remarks of counsel, may have led the jury to believe that the court indorsed the statements made, and thus the prejudice

would be enhanced. The language of counsel, and the non-interference of the court, denied to Goerig and wife the right to have the case submitted to the jury solely upon its merits, and to have the jury determine it uninfluenced by passion or prejudice for or against any other party to the action. For this error, the judgment must be reversed. *Spencer v. Arlington*, 49 Wash. 121, 94 Pac. 904; *Cranford v. O'Shea*, 75 Wash. 33, 134 Pac. 486; *Rogers v. Kangley Timber Co.*, 74 Wash. 48, 132 Pac. 731.

The appeal of the taxicab company will be dismissed and the judgment as to that company affirmed. The judgment as to the Puget Sound Bridge & Dredging Company, and Gribble and wife, will be reversed, and the cause directed to be dismissed as to them. The judgment against Goerig and wife will be reversed and the cause remanded as to them for a new trial. The Puget Sound Bridge & Dredging Company, Gribble and wife, and Goerig and wife will recover their costs in this court against the respondent. The respondent will have costs against the Seattle Taxicab Company, except as to those costs which are charged against her and in favor of the Puget Sound Bridge & Dredging Company, Gribble and wife, and Goerig and wife.

MORRIS, C. J., ELLIS, and CROW, JJ., concur.

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[No. 12370. Department Two. May 22, 1915.]

JOHN A. MAGNUSSON, *Respondent*, v. PETER R. TANZY,
Appellant.¹

PATENTS—ASSIGNMENT—RESCISSION—FALSE REPRESENTATIONS—KNOWLEDGE. An assignment of a patent will not be cancelled for false representations by the assignee as to his financial resources for the manufacture of the machines, which was the consideration for the assignment, where his inability to finance the enterprise alone was known to plaintiff early in their negotiations and before the assignment was made.

PATENTS—ASSIGNMENT—CONSIDERATION—EVIDENCE. A finding of failure of consideration for assignments of a half interest in two patents is supported by evidence to the effect that the assignment was made on defendant's agreement to manufacture and market the machines at the joint expense of the plaintiff and defendant, and divide the profits, that both contributed in equal amounts to the manufacture of eight machines, and that the defendant thereafter refused to advance any money for the manufacture of machines necessary to protect one of the patents.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered January 31, 1914, in favor of the plaintiff, in an action for rescission, tried to the court. Affirmed.

L. C. Stevenson, for appellant.

H. R. Lea and *H. G. Fitch*, for respondent.

ELLIS, J.—This action was brought to rescind a verbal contract and to cancel and set aside written assignments of an undivided one-half interest in two patents, one for the United States, the other for Canada, of a certain mechanical device invented by the plaintiff.

The complaint, though somewhat inartificially drawn, sufficiently sets up two grounds for the rescission of the oral contract and the cancellation of the assignments. It is first claimed that prior to the time of the application for these

¹Reported in 148 Pac. 883.

patents, an agreement was entered into between the plaintiff and defendant whereby the defendant was to pay the expense of obtaining the patents, finance the manufacture and sale of the contrivance and pay to respondent one-half of the profits realized in the enterprise, in consideration of the plaintiff's assignment of a one-half interest in the patents to the defendant. It is alleged that, at the time of these negotiations, the defendant represented that he could devote at least \$5,000 to financing the enterprise; that the plaintiff made the assignments in reliance upon this representation and as security to the defendant for the carrying out of the contract; that these representations were false and fraudulent, and for that reason the plaintiff is entitled to a rescission of the contract and a cancellation of the assignments. As a second ground for the cancellation, it is alleged that the defendant has refused to fulfill the terms of his agreement, and by reason thereof there is a total failure of consideration for the assignments.

The defendant answers that the only agreement entered into was that he should pay the expense of procuring the patents in consideration of an assignment of an undivided one-half interest therein, and denies that he entered into any agreement to finance the manufacture and sale of the machine. The reply put in issue the affirmative matter in the answer.

The assignments were made under the following circumstances: The plaintiff is a mechanic who has been employed in the shops of the Northern Pacific Railway Company, at South Tacoma, for the last eleven years in the capacity of foreman. During that period, he invented and brought to a stage of more or less complete efficiency a device for extracting bolts from the iron and steel framework of cars and locomotives. He had never applied for a patent on this device, but had for some years employed it for his own use and that of the men under his direction as foreman. In March, 1911, the defendant began work in the Northern Pacific shops. The

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plaintiff was his foreman. In April, 1911, having become familiar with the use of the bolt extractor, he inquired of the plaintiff why he had not secured a patent on it, and the plaintiff replied that he had not sufficient funds. At this point the evidence becomes sharply conflicting. The plaintiff testified to the effect that the defendant expressed a desire to secure an interest in the device, when the plaintiff said: "If you wish to become interested in a patent on it I can arrange to have the designs finished so that it will be patentable." The defendant said: "Concerning the money, that is an easy part of it. I can raise \$5,000 any time it is needed. My father-in-law is well off and I get all the money I want to from him." The plaintiff then replied: "All right, if you feel that way I will tell you what I will do. You get the patents and make the machine and sell it and give me one-half of the profits." The defendant replied: "All right, I will go you." Two disinterested witnesses, who claim to have heard this conversation, corroborate the plaintiff, except that one of them did not remember that anything was said as to the \$5,000. In response to a question by the court as to what was the consideration for the assignments, the plaintiff answered:

"Why, he promised to make the machine and sell it and give me half of the profits, of the income for the machine,—that is what I got out of it, that is what he got the assignment for. He was to patent the machine and make it and sell it and give me half of the profits."

The defendant testified to the effect that in April, 1911, he talked with the plaintiff about the invention, asked if it was his and why he did not get it patented; that the plaintiff said he did not think it was worth it; that the defendant said that he thought it was a handy contrivance and asked what the plaintiff would take for his "signature," by which he explained he meant an assignment of the right to secure a patent on the invention; that the plaintiff answered he would take a one-half interest, to which the defendant said, "All

right;" that a few days later he asked the plaintiff to sign the application for a patent, and the plaintiff inquired, "Are you going to take out that patent?" That the defendant answered in the affirmative, and the plaintiff then said he would make some improvements so that they could all be patented together, and would make drawings of it so that the defendant could take them to a certain patent attorney and apply for a patent.

It appears that the matter stood on these somewhat indefinite negotiations until some time in May, when the parties together visited a patent attorney in Tacoma to ascertain whether the device was patentable. The defendant paid the attorney \$5 for making a search, and the parties were advised that it was, whereupon the attorney was directed to apply for a patent. The defendant further testified that, on the way home from this visit, the subject of manufacturing the article was first broached; that the plaintiff then said, "We will make them and sell them, each paying one-half;" that the defendant answered, "That is all right," and that this was all that was ever said regarding the manufacture of the machine. The plaintiff, after this first visit to the patent attorney, suggested that the machine would be much more effective with jaws so constructed as to grasp the projecting end of the bolt intended to be removed and hold it firmly while the power of the jack was being applied to force the bolt from the iron frame. Upon this suggestion it was agreed to delay application for the patent until the plaintiff had finally perfected the jaws, which, it seems, constitute one of the chief features of the device as finally patented. On the first visit to the patent attorney, the parties were advised that the plaintiff could not assign to the defendant the full right to secure a patent, since at least one of the applicants must be the inventor himself. The assignment of an undivided one-half interest in the right to secure a patent for the United States was made by the plaintiff to the defendant on Janu-

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ary 27, 1912. The application for a patent from the United States had been made in the names of both parties in September, 1911, and the patent was finally issued in March, 1912. About this time the parties determined to secure a patent also in the Dominion of Canada. The assignment of the right to a one-half interest as to the Canadian patent was made on March 30, 1912, and the Canadian patent was issued to the parties jointly in May, 1912. The defendant paid the expense of securing both patents, aggregating \$182. In the meantime the plaintiff had manufactured eight of the machines at his own expense. Two of the machines were finally sold for \$250 each, and after the sale the defendant paid to the plaintiff one-half the cost of the manufacture of the several machines.

It is undisputed that both parties knew that, to protect the Canadian patent right, it would be necessary to manufacture machines in Canada within two years from the issuance of patent. In view of this fact the plaintiff insisted that the defendant finance the manufacture of the machines in Canada. It seems to be undisputed, also, that this would necessitate an initial expenditure of about \$500. At this time the parties had on deposit to their joint account as the net proceeds of the sale of the two machines something near \$200. The defendant definitely refused to advance any money for the manufacture of the machines in Canada, and wrote to the plaintiff that he believed the Canadian venture was a loss; that he would do nothing further in the matter, and would not invest another dollar in the bolt extractor other than to permit the use of the money on deposit to the joint credit of the parties. The plaintiff thereupon brought this suit.

The case was tried to the court without a jury. The court made no findings of fact or conclusions of law, but entered a decree cancelling both assignments, directing that the plaintiff repay to defendant the \$182 paid by him for securing the patents, with interest thereon, and directing a division of

the money in the bank after satisfying all debts which had been incurred in the enterprise. The defendant appealed.

The appellant first contends that, under the evidence, the sole consideration for the assignment of the one-half interest in the right to secure patents was the appellant's agreement to pay the cost of securing them. As we view the evidence it does not support this contention. The appellant himself admitted that the agreement to manufacture the machines, each paying one-half of the cost and dividing the profits equally, was made in May, 1911, several months before either patent was applied for. We think the entire evidence shows that the assignments were made with the understanding that the parties would engage in the manufacture of the machines, and that this understanding was a part of the consideration for the assignments.

It is next claimed that there was not sufficient evidence of fraudulent representations as to his financial condition and resources on the appellant's part to entitle the respondent to a rescission, and that in any event the respondent learned that the appellant was without financial resources long prior to this action and was therefore guilty of such laches as to bar rescission on the ground of fraud. The evidence preponderates in favor of the respondent's claim that the representations were made. If they were made, it is admitted that they were false. It is clear, however, that the respondent was fully aware of the appellant's inability to finance the enterprise alone early in the negotiations and long before he made the assignments. Under these circumstances, he is not entitled to a rescission on the ground of fraudulent representations.

The ultimate question for decision is thus reduced to an inquiry as to what was the real consideration for the assignment, and as to whether there was such failure of consideration as to entitle the respondent to a rescission. As we have shown in our statement of the case, there was a sharp con-

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flict as to what the contract was. In fact, the evidence of both parties is so vague and indefinite as to make it doubtful whether, but for their subsequent acts in carrying out the agreement, there was established any enforceable contract. The evidence, such as it is, preponderates in favor of the respondent's claim that the appellant agreed to finance the manufacture and sale of the machines and divide the profits with the respondent in consideration of a one-half interest in the patents. But the acts of the parties tend to support the appellant's claim that the agreement was that the parties should manufacture and market the machines at their joint expense and divide the profits. Both contributed in equal amounts to the manufacture of the eight machines which were made, and the respondent seems finally to have demanded no more than that the appellant proceed on that basis and furnish his part of the money for manufacturing the machines in Canada in order to preserve the Canadian patent. In view of the contract, however, it is clear that the appellant has failed to meet the agreement. If the agreement was that he should finance the manufacture and sale of the machines, he has wholly failed to meet it and has expressly repudiated it. If the agreement was that he should pay one-half of the expense of such manufacture and sale, he has failed to meet his duty in that regard, since he has positively declined to advance any money for the manufacture in Canada, thus jeopardizing the Canadian patent. Whichever view, therefore, is taken as to the agreement of the parties, it is evident that appellant has failed to carry out his obligations and that the consideration for the assignments has failed.

In view of the indefinite nature of the contract, which is so vague in its terms as to render it unenforceable, and in view of the confessed financial irresponsibility of the appellant, we are satisfied that the trial court's decision placing the parties in *statu quo* by cancelling the assignments and decreeing the payment to the appellant of all sums advanced by him for

the money in the bank after satisfying all debts which had been incurred in the enterprise. The defendant appealed.

The appellant first contends that, under the evidence, the sole consideration for the assignment of the one-half interest in the right to secure patents was the appellant's agreement to pay the cost of securing them. As we view the evidence it does not support this contention. The appellant himself admitted that the agreement to manufacture the machines, each paying one-half of the cost and dividing the profits equally, was made in May, 1911, several months before either patent was applied for. We think the entire evidence shows that the assignments were made with the understanding that the parties would engage in the manufacture of the machines, and that this understanding was a part of the consideration for the assignments.

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In view of the indefinite nature of the contract, which is so vague in its terms as to render it unenforceable, and in view of the confessed financial irresponsibility of the appellant, we are satisfied that the trial court's decision placing the parties in *statu quo* by cancelling the assignments and decreeing the payment to the appellant of all sums advanced by him for

the money in the bank after satisfying all debts which had been incurred in the enterprise. The defendant appealed.

The appellant first contends that, under the evidence, the sole consideration for the assignment of the one-half interest in the right to secure patents was the appellant's agreement to pay the cost of securing them. As we view the evidence it does not support this contention. The appellant himself admitted that the agreement to manufacture the machines, each paying one-half of the cost and dividing the profits equally, was made in May, 1911, several months before either patent was applied for. We think the entire evidence shows that the assignments were made with the understanding that the parties would engage in the manufacture of the machines, and that this understanding was a part of the consideration for the assignments.

It is next claimed that there was not sufficient evidence of fraudulent representations as to his financial condition and resources on the appellant's part to entitle the respondent to a rescission, and that in any event the respondent learned that the appellant was without financial resources long prior to this action and was therefore guilty of such laches as to bar rescission on the ground of fraud. The evidence preponderates in favor of the respondent's claim that the representations were made. If they were made, it is admitted that they were false. It is clear, however, that the respondent was fully aware of the appellant's inability to finance the enterprise alone early in the negotiations and long before he made the assignments. Under these circumstances, he is not entitled to a rescission on the ground of fraudulent representations.

The ultimate question for decision is thus reduced to an inquiry as to what was the real consideration for the assignment, and as to whether there was such failure of consideration as to entitle the respondent to a rescission. As we have shown in our statement of the case, there was a sharp con-

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securing the patents, accords as nearly with exact justice as any decision which could have been reached on the indefinite and conflicting evidence. We have examined the record with the utmost care. We are satisfied that the judgment should be affirmed. It is so ordered.

MORRIS, C. J., FULLERTON, MAIN, and CROW, JJ., concur.

[No. 12359. Department Two. May 24, 1915.]

WILLIAM A. CRAWFORD *et al.*, Appellants, v. A. F. TIMM
et al., Respondents.¹

VENDOR AND PURCHASER—BONA FIDE PURCHASER—POSSESSION—NOTICE. The retention of possession by grantors, after giving a deed conveying full title, is not constructive notice to an innocent subsequent purchaser from the grantee that the grantor retained an interest in the land; since the absolute conveyance estops the grantor from setting up any secret arrangement which might impair the grant.

Appeal from a judgment of the superior court for Stevens county, Jackson, J., entered October 7, 1913, upon findings in favor of the defendants, in an action to quiet title, tried to the court. Affirmed.

Jesseph & Bourland, for appellants.

Stull, Wentz & Bailey and *Reed & Boughton*, for respondents.

MORRIS, C. J.—Prior to February 11, 1913, appellants were the owners of a ranch in Stevens county. On that day, as the result of negotiations commenced some days previous, they conveyed this ranch to one Miller, subject to a mortgage of \$1,500. The consideration for this conveyance was an exchange of certain lands in Ochiltree county, Texas, of which Miller represented himself as the owner. A few days later the respondent A. F. Timm, who was the owner of a

¹Reported in 148 Pac. 886.

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ranch near Coeur d'Alene, Idaho, and who had listed this ranch for sale or exchange with the Colvin Realty Company, of Spokane, met Miller, and as a result of negotiations between them, Timm exchanged his Idaho ranch for the Stevens county ranch which the Crawfords had, by warranty deed, conveyed to Miller subject to the \$1,500 mortgage. Timm had some acquaintance with the Stevens county ranch, and in addition made some inquiries of one Turner, satisfying himself that the property was as represented by Miller. Timm was told by Miller that, under the arrangements made, Crawford was to remain in possession of the Stevens county land until April 1, 1913, for the purpose of wintering his stock. Prior to the delivery of his deed to Miller, Timm caused the Colvin Realty Company to examine an abstract covering the Crawford ranch and the deed from Crawford to Miller, and satisfied himself as to the title to the land. He then started for the Crawford ranch, arriving there the evening of February 24th, and remaining until the morning of February 26th.

During this interim, Crawford and Timm had numerous conversations relative to the character of the understanding between Crawford and Miller, under which Crawford had conveyed to Miller. The only difference between them as to these conversations is that Crawford says he told Timm that the purpose of his remaining in possession until April 1st was to enable him to winter his stock and have an opportunity to examine the Texas lands, and if these were not found to be as represented by Miller the exchange was to be called off. Timm denies that anything was said as to Crawford remaining until April 1st other than to winter his stock and await the opening of some mining work in which he was interested, and that for this purpose he gave his consent for Crawford to so remain. The findings of the lower court favored Timm's version of these conversations, with which findings we agree, as they are supported by a preponderance of the testimony. The attorney who drew the deed from

Crawford to Miller testified that, at the time he drew the deed, he cautioned Crawford and urged him to be careful, and Crawford answered that he was satisfied. Miller's representations as to the Texas land were fraudulent, and his deed was worthless. Crawford commenced this action to quiet title as to Timm and Miller, on March 21, 1918, upon receipt of information from Texas to the effect that the lands conveyed by Miller were school lands and the sale had been forfeited for nonpayment of interest, and further informing him that the records did not show that Miller had any interest in the land. Being unsuccessful, Crawford has appealed. No question is raised as to Timm's good faith.

The facts stated are sufficient to present the legal question involved as to the effect of Crawford's possession as being notice to Timm, and bring the case squarely within the rule of *Murry v. Carlton*, 65 Wash. 364, 118 Pac. 332, 44 L. R. A. (N. S.) 314, where it is held that possession by a grantor subsequent to his conveyance of full title of record is not constructive notice to a subsequent innocent mortgagee of a grantor's right to remain in possession under an agreement calling for the support and maintenance of the grantor, giving him possession of the premises during life, this agreement not being placed of record. The above holding disposes of the appeal. Having so recently passed upon this question, it is not necessary to again refer to the reasoning or authorities adopted by us in reaching our conclusion upon a question concerning which there is much difference of opinion. We are now, as we were then, satisfied with the conclusion then reached as in accord with the better reasoning and the great weight of authority. Appellants' unfortunate situation is the result of their own credulity and lack of business sense. Their own act has brought this misfortune upon them, and they cannot now shift its burden to respondent, who is innocent of wrongdoing.

Upon authority of the cited case, the judgment is affirmed.
CROW, MAIN, FULLERTON, and ELLIS, JJ., concur.

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[No. 12225. Department Two. May 27, 1915.]

C. A. GWINN, *Respondent*, v. L. A. FORD *et al.*, *Appellants*.¹

BILLS AND NOTES—ACTIONS—DEFENSES—HOLDER IN DUE COURSE—NOTICE OF FRAUD. In an action on promissory notes, the answer sufficiently sets up an affirmative defense of fraud, and that plaintiff was not a holder in due course, where it alleged that the notes had been given to enable the payee to purchase stock on the representations of the payee that he could sell at an advance, that the stock was at all times valueless, and that plaintiff introduced the payee to defendants, and had knowledge of the fraud, the whole proposition being a scheme and conspiracy to obtain possession of the notes.

SAME—PLEADING—ALLEGATION OF CONDITIONAL DELIVERY—SUFFICIENCY. In an action on a promissory note, an answer setting up that it was distinctly agreed by and between the makers and payee that the note was to be used for the purpose of raising the necessary money to finance a certain transaction, and purchase certain stock, negatives a conditional delivery of the note, such as would enable the makers to show by parol that it was to become a binding agreement only upon the happening of a certain contingency.

EVIDENCE—PAROL EVIDENCE—LIABILITY ON NOTE. An oral agreement made prior to the execution and delivery of a promissory note, affecting the manner in which it is to be paid, cannot be shown for the purpose of modifying or contradicting the written obligation.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 30, 1914, in favor of the plaintiff, upon sustaining a demurrer to the affirmative defenses, in an action on promissory notes, tried to the court. Reversed.

Mulligan & Bardsley, for appellants.

MAIN, J.—The purpose of this action was to recover upon two promissory notes. The complaint alleges as a first cause of action, in substance, that the defendants L. A. Ford and Anna Ford, his wife, on July 15, 1910, for value received, made, executed, and delivered to the defendant E. J. Rice, a promissory note for the principal sum of \$300, bearing

¹Reported in 148 Pac. 891.

interest at 8 per cent per annum, payable semi-annually, and providing for the payment of a reasonable attorney's fee in case of suit thereon; that subsequent to the execution of the note, and prior to the maturity thereof, the defendant E. J. Rice, for value, sold and transferred the note to the plaintiff, who is now the owner and holder thereof; that at the time the defendant E. J. Rice sold and assigned the note to the plaintiff, he guaranteed the payment of the same by a written guarantee indorsed on the back of the note; and that the whole amount of principal and interest is due and unpaid.

The allegations contained in the second cause of action are the same as those of the first cause of action, except the note sued upon is for the principal sum of \$500.

The defendants Ford and wife answered the complaint by denials and by setting up an affirmative defense. To this answer, a general demurrer was interposed and sustained. They thereupon filed an amended answer, denying each and every allegation contained in both causes of action, except as admitted, qualified or explained in the affirmative defenses of the answer. The same affirmative defense was interposed to each cause of action in the complaint, and in substance alleged: That shortly prior to July 15, 1910, the plaintiff introduced the defendant E. J. Rice to Ford and wife, stating that Rice had a business proposition which he desired to take up with them; that Anna D. Ford had been well acquainted with the plaintiff for nearly twenty-five years, and had implicit confidence in his integrity and honesty, and by reason thereof relied upon each and every representation and statement made by him, and entertained the business proposition, which resulted in the execution and delivery of the notes in question; that shortly after his introduction, Rice, in explanation of the business proposition referred to, stated to Mr. and Mrs. Ford that he was a stock salesman connected with a corporation known as the "Jexite Powder Company;" that he was well and intimately acquainted with its affairs; that at that time its stock was selling in the open market

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at 35 cents per share; that on account of inside information of the affairs of the company which he had, he knew the stock to be of much greater value than 35 cents per share, and in a very few days the price would be raised; that he knew where the stock could be sold in a very few days at 50 cents per share, and that he could and would sell the stock at that price; and thereupon Rice proposed that if Mr. and Mrs. Ford would finance a proposition whereby he could purchase a certain amount of the stock at 35 cents per share, he would resell the stock at 50 cents per share within a very few days, and divide with them the profits made on the transaction; that after some negotiations, Mr. and Mrs. Ford agreed with Rice to execute the notes in suit; that Rice agreed that these notes were to be used to raise the necessary money to finance the purchase of stock of the "Jexite Powder Company" at 35 cents per share; that Rice was thereafter to sell this stock prior to the date of the maturity of the notes, the first proceeds from such sale to be used to pay off the notes, and the profits realized from the transaction, after payment of the notes, to be divided between Rice and Mr. and Mrs. Ford; that the stock has never been sold by the plaintiff or by Rice, and Mr. and Mrs. Ford, upon information and belief, allege that the whole proposition was a scheme and conspiracy to wrongfully deprive them of the possession of the notes; that after the execution of the notes, they learned for the first time that the plaintiff was cooperating with Rice, and that the plaintiff, at the time of the execution of the notes, and at all times thereafter, was fully advised as to the nature of the contract between Rice and Mr. and Mrs. Ford, under which the notes were executed and delivered, and further, that they had never received anything of value for the notes; that the stock of the "Jexite Powder Company" was at all the times herein mentioned, and now is, valueless, and has no market value.

To these affirmative defenses, the plaintiff interposed a general demurrer, which was sustained. The cause thereafter

came on for trial before the court without a jury, upon the complaint and the general denials contained in the amended answer. The defendant Rice made no appearance, but suffered judgment to be entered against him by default. At the trial, Mr. and Mrs. Ford admitted the execution and delivery of the notes sued upon. Whereupon the court entered a judgment against all of the defendants for the sum of \$1,031.93, principal and interest, \$100 as attorney's fee, and for costs. The defendants Ford and wife have appealed.

The principal question in the case is whether the facts stated in the affirmative defense charge fraud, and that the plaintiff was not a holder in due course. We think, if the facts stated are true, it necessarily follows that the execution and delivery of the notes were induced by fraudulent representations, and that the plaintiff is not a holder in due course. The rules governing the essential elements of actionable fraud are so well settled as to make unnecessary a review of them. The sustaining of the demurrer by the superior court was prejudicial error. Whether the transaction was a fraudulent one, and whether the plaintiff was a holder in due course, were questions which should have been determined upon a trial of the issues of fact. The respondent has neither made appearance in this court nor filed a brief, evidently realizing that the ruling upon the demurrer could not be sustained.

The appellants claim that their answer contains a plea of conditional delivery of the notes. It is true that it is competent for the maker of a note to show by parol that the note was to become a binding agreement only upon the happening of a certain contingency, and that such contingency has not happened. *Ewell v. Turney*, 39 Wash. 615, 81 Pac. 1047; *Seattle National Bank v. Becker*, 74 Wash. 431, 133 Pac. 613. But the pleading in this case does not bring it within the rule. The answer alleges:

"That it was distinctly understood and agreed by and between these defendants and the said Rice that the said note was to be used by said Rice for the purpose of raising the

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necessary money to finance the transaction above described, and to purchase a certain amount of the stock of the 'Jexite Powder Company' at thirty-five cents per share. . . ."

This allegation negatives the idea of a conditional delivery. On this question the facts alleged, if true, show an oral agreement made prior to the execution and delivery of the notes, affecting the manner in which they were to be paid. Obviously, the written promise to pay cannot be modified or overcome by such an agreement, if one were made. There is nothing in the pleading to show a conditional delivery, and the oral agreement referred to cannot be interposed for the purpose of modifying or contradicting the written obligation.

The judgment will be reversed, and the cause remanded.

MORRIS, C. J., ELLIS, FULLERTON, and CROW, JJ., concur.

[No. 12229. Department Two. May 27, 1915.]

ALBERT E. PARKER, *Respondent*, v. WASHINGTON TUG & BARGE COMPANY, *Appellant*.¹

APPEAL—REVIEW—WAIVER OF ERROR—NONSUIT. Error in the denial of a motion for nonsuit is waived, where defendant presents his evidence, and the case will thereafter be reviewed on appeal upon the entire testimony.

APPEAL AND ERROR—REVIEW—FINDINGS. Where there is substantial evidence to support the verdict, the finding of a jury upon a disputed question of fact will not be disturbed on appeal.

SHIPPING — CONTRACTS — TOWAGE OR CHARTER PARTY—INJURY TO VESSEL—LIABILITY. A contract of bailment for hire constituting a charter party, and not one of towage, is established by evidence showing that defendant was using its own tugs and barges to convey sand from plaintiff's sand plant to contractors at V. who, becoming urgent for sand, contracted with plaintiff for the use of his scow for a certain voyage, to be loaded by plaintiff and then towed by defendant, and that plaintiff had nothing to do with the towing of the scow, but that the use of his scow for the particular trip mentioned

¹Reported in 148 Pac. 896.

was hired from him by the defendant; hence loss or damage to the scow is to be measured according to the law of bailment.

SAME — NEGLIGENCE — CHARTERER — BURDEN OF PROOF. Where a chartered scow broke away from her tow and was wrecked and was injured while in the exclusive possession of the bailee, the burden is upon it to show how the injury occurred and that it was free from negligence.

SHIPPING—INJURY TO SCOW — INSTRUCTIONS — REASONABLE CARE. In instructing the jury on the measure of defendant's duty while in possession of a scow as bailee, the use of the term "responsible" in place of "reasonable," as modifying "skill and care" was not prejudicial as tending to mislead the jury, where subsequently in the same instruction it was said that the exercise of "reasonable care and caution and maritime skill" was all that was required.

SHIPPING—INJURY TO SCOW—INSTRUCTIONS—LIABILITY. In an action for damages to a scow while bailed to defendant, where the evidence was conflicting as to whether plaintiff had authorized the defendant to employ another tugboat company to tow the scow with a gasoline tug of insufficient power, it was proper to instruct the jury that, if plaintiff knew nothing of the arrangement for the use of a gasoline tug and did not consent thereto, the defendant would be liable if the scow was damaged as claimed.

APPEAL—REVIEW — HARMLESS ERROR — INSTRUCTIONS. Refusal of requested instructions is not prejudicial when the instructions given correctly state the law applicable to the facts in the case.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered November 10, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages. Affirmed.

James Kiefer, for appellant.

Wright, Kelleher & Caldwell and *Robert H. Evans*, for respondent.

MAIN, J.—The purpose of this action was to recover damages sustained by a scow or barge while in the possession of the defendant. After the issues were framed, the cause was tried to the court and a jury. At the conclusion of the plaintiff's testimony, the defendant interposed a motion for a nonsuit, which was overruled. At the conclusion of all the evidence, the defendant challenged the sufficiency of the evidence

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to sustain a verdict, and moved the court for a directed verdict. Neither the challenge to the evidence nor the motion for a directed verdict were sustained. The jury returned a verdict for the plaintiff in the sum of \$1,512.15. The defendant interposed a motion for judgment notwithstanding the verdict, and in the alternative for a new trial, both of which were denied. A judgment was entered upon the verdict. The defendant appeals.

The facts, so far as necessary to an understanding of the questions to be noticed, are these: During the month of December, 1912, and for some time prior thereto, the respondent was the operator and owner of a sand plant at Eagle Harbor, in Kitsap county, Washington. The appellant was engaged in the business of towing barges and other craft upon Puget Sound and adjacent waters. During the summer and fall of the year 1912, the Anderson Construction Company had a contract for the construction of certain street paving in the city of Victoria, B. C. This company being unable to complete its contract, it was succeeded by the M. P. Cotton Company, Ltd., of Vancouver, B. C. After the contract was taken over by the Cotton company, one L. S. Wood, the secretary of the appellant company, at the request of the Cotton company, went to Victoria, and met M. P. Cotton of that company. At this time it was agreed between the Cotton company and the appellant that the former would pay 50 cents a yard for paving sand, and 50 cents a yard for towing the same from Eagle Harbor to Victoria.

After Wood returned from Victoria, he either went to see the respondent or had a talk with him over the 'phone. In any event, whatever the manner of the conversation, it was agreed that the respondent, Parker, would furnish the sand, f. o. b. Eagle Harbor, billed direct to the M. P. Cotton Company; that the appellant would deliver its own scows at the sand plant to be loaded, and when loaded would tow the same to Victoria. The respondent had no contract with the Cotton

company, and never had any conversation with any representative of that company relative to this matter.

Some time early in the month of December, 1912, the Cotton company wired both the appellant and the respondent that, owing to the lack of sand, they had been compelled to shut down the work. These telegrams were urging an early delivery of the sand. At this time the defendant company, according to the testimony of Wood, "was very busy, the weather uncertain, stormy at times, scows were held up, and the defendant company hard pushed for scows enough to transact the business; and had telegrams and letters from Cotton urging for the sand, saying that they were shut down for want of it." The defendant company not being able to supply its own scows to be loaded at the sand plant, contracted with the respondent for the use of his scow called the "Big Sandy." The respondent was to load the scow with 250 yards of sand. After it was loaded, the appellant was to tow it to Victoria with its steam tug "Challenge," or some other of its tugs of equal capacity. For the use of the scow upon this trip the respondent was to be paid by the appellant one-third or one-fourth of the towage charge which he would collect from the Cotton Company; the exact amount is immaterial.

After this arrangement was made, the respondent loaded the "Big Sandy" with 250 yards of sand, and notified the appellant of this fact. At this time the tugs of the appellant company were all busy, and its tug "Challenge" would not be in for several days. The M. P. Cotton Company being very desirous of having the sand as soon as possible, and urging its immediate delivery, the appellant company contracted with the Elliott Bay Tug & Barge Company to tow with the gasoline launch "Monaghan" the "Big Sandy," together with a scow loaded with brick, to Victoria. The tug "Monaghan" was capable of developing 80 or 90 horse power. The steam tug "Challenge" had a horse power of 185. Up to this point, the facts are not in dispute.

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Wood testified that he was authorized by the respondent to secure some other towing company to take the "Big Sandy" to Victoria. This the respondent denies, and he testified that he had no knowledge that the scow was to be towed by any other tug boat than the "Challenge."

On December 16, after taking in tow at Seattle a scow loaded with brick, the tug "Monaghan" proceeded across the sound to Eagle Harbor, arriving there at about 2 o'clock p. m. of that day. After fastening the hawser or tow line to the "Big Sandy," the tug proceeded on its way to Victoria. It left Eagle Harbor about 3:30 and arrived at Marrowstone Point or Flagler at 5:30 the next morning. Here it waited for a favorable tide, and departed from Flagler for Victoria at 10:30 o'clock on the morning of the 17th of December. While crossing the strait of Juan de Fuca, at about 3 o'clock in the afternoon, a high wind arose, and the sea became very rough. Some time later in the afternoon, while the storm was still prevailing, the "Big Sandy" broke her tow line. Owing to the roughness of the sea, it was impossible to again take the scow in tow. The tug with the scow loaded with brick proceeded towards Victoria, arriving there at about 6:30 o'clock in the evening.

Subsequently the "Big Sandy" was found upon a beach to which she had floated, and was towed into Victoria. Some days later the respondent was notified by Wood that the scow had been wrecked; and at another time, was further notified that it was at Ballard. A few days after this, the respondent was notified by the Ballard Marine Railway Company that the scow was afloat in the sound. Thereupon the plaintiff employed a tug to take the scow in tow and bring it to Eagle Harbor. The present action was brought for the purpose of recovering damages which the scow sustained. No complaint is made as to the amount of the verdict returned.

The appellant's brief contains twenty-seven assignments of error, and in the portion of the brief devoted to the argu-

ment, seventeen points are separately stated and argued. It is first claimed that the court erred in denying the appellant's motion for a nonsuit. As appears from the facts stated, the appellant did not stand upon its motion, but after the same was overruled, presented its evidence. Where a motion for a nonsuit is denied, and the appellant does not stand upon the motion, but presents its evidence, the case will thereafter be reviewed upon the entire testimony. By failure to stand upon the motion for a nonsuit, that motion is waived. *Ryan v. Lambert*, 49 Wash. 649, 96 Pac. 232.

Considering the case upon all the evidence, the appellant insists that its motion for a directed verdict should be sustained. One of the grounds of negligence charged in the complaint was the attempt to tow, with a gasoline tug of 80 horse power, the two scows across the strait of Juan de Fuca at the time of year mentioned, under the weather conditions then prevailing. The evidence introduced on behalf of the plaintiff tends to support the claim of negligence as stated in the complaint. The evidence introduced on behalf of the appellant tends to support its position that it at all times acted in accordance with what is termed "good seamanship," and exercised reasonable care and caution. The appellant's evidence tends also to support its claim that the barge was defective, and that the accident was brought about by this fact. This is contradicted by the respondent's evidence. The question whether or not the appellant in attempting to tow the two barges across the strait with the gasoline tug "Monaghan" was exercising reasonable care and skill was obviously a question of fact for the jury to determine. Upon this question the appellant in its brief states that the "respondent certainly failed to sustain the burden of proof requiring him to prove the negligent acts complained of in his complaint; and also to establish that the loss of his barge was occasioned by such negligent acts." It has become the settled law in this state that the finding of a jury upon a disputed question of fact, where there is substantial evidence

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to support the verdict, will not be disturbed upon appeal. *Allard v. Northwestern Contract Co.*, 64 Wash. 14, 116 Pac. 457; *Druglis v. Northwestern Imp. Co.*, 41 Wash. 398, 83 Pac. 101; *Irwin v. Buffalo Pitts Co.*, 39 Wash. 346, 81 Pac. 849; *McKensie v. North Coast Colliery Co.*, 55 Wash. 495, 104 Pac. 801, 28 L. R. A. (N. S.) 1244; *McKean v. Chappell*, 56 Wash. 690, 106 Pac. 184; *Seasmith v. Brown*, 61 Wash. 164, 112 Pac. 337; *Critler v. Jacobson & Lindstrom*, 66 Wash. 322, 119 Pac. 819; *Fitzpatrick v. Newland*, 81 Wash. 401, 142 Pac. 867; *Woodard v. Cline Lumber Co.*, 81 Wash. 85, 142 Pac. 475.

The appellant's principal contention seems to be that the trial court erred in submitting the cause to the jury upon the theory that the appellant company was a bailee for hire of the scow "Big Sandy" when it was damaged. The appellant's position is that the contract between the appellant and the respondent relative to the "Big Sandy" was one of towage and not a contract of bailment. This contention cannot be sustained. The undisputed facts show that the appellant company contracted with the Cotton company to do the towing at 50 cents per yard, and the Cotton company would pay in addition 50 cents per yard for the sand; that the respondent contracted with the appellant to furnish the sand and load the same upon the appellant's scows; that the sand was to be billed f. o. b. Eagle Harbor; that because the appellant could not furnish scows when the Cotton company demanded the sand, the appellant contracted with the respondent for the use of his scow, the "Big Sandy," for a certain price; and that the respondent had nothing whatever to do with the towing of the scows loaded with sand to Victoria. These facts show not only that the respondent made no contract for towage, but that the appellant hired from him the use of the scow in question for the particular trip mentioned. Where a contract is made by which the owner of a ship or other vessel lets the whole or a part of her to another person for the conveyance of goods on a particu-

lar voyage in consideration of the payment of a sum mentioned, the contract is what is known as a charter party. Bouvier's Law Dictionary; Hughes, Admiralty, p. 155. Where a water craft is chartered and is not returned at all, or returned in a damaged condition, the charterer's liability will be resolved according to the law of bailment. In other words, the charterer becomes a bailee. *The Three Brothers*, 145 Fed. 177; *Bleakley v. City of New York*, 139 Fed. 807.

In the *Three Brothers* case, the city of New York had hired a scow which, while in its possession, was damaged by floating ice in North river. By the circuit court of appeals for the second circuit, it was there said:

"Under the well-settled law as laid down in the cases cited by the court below in its opinion, we think the city was liable as bailee for negligence."

As already stated in this case, the cause was submitted to the jury as though the appellant had become a bailee of the scow. It is not claimed that the instructions incorrectly stated the measure of liability applying the law of bailment, but it is claimed that the instructions are erroneous because they submitted "the case upon the theory of a bailment. This is not and never was the relation existing between tug and tow. No maritime law can be found which will justify these instructions." From this excerpt quoted from the appellant's brief, it would seem that its position is that, since the action was based upon a maritime contract, it was necessarily one for towage and not one of bailment. In the authorities last above cited, the contracts there under consideration were maritime contracts; and it was held that liability should be measured according to the law of bailment.

In *Swenson v. Snare & Triest Co.*, 160 Fed. 459, the circuit court of appeals for the second circuit, while considering liability under a charter party, said:

"This was a libel *in personam* to recover damages for the loss of a pile driver which occurred in the East river in July, 1905. It is admitted that the pile driver was chartered by

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the respondent from the libellant and that while in the exclusive possession of the respondent, it sank and was lost. As such an occurrence is not in the ordinary course of things, the burden was thrown on the respondent as a bailee to show how the loss took place and that it was not caused by its negligence."

In *Terry & Tench Co. v. Merritt & Chapman Derrick & Wrecking Co.*, 168 Fed. 533, it was said:

"The vessel having been injured while in the exclusive possession of the respondent, as bailee, the burden is upon it to show: (1) How the injury occurred. (2) That it was free from negligence."

In the case of *The Genessee*, 138 Fed. 549, a vessel while in the custody of a tug was lost. It was there said:

"The case is a proper one for the application of the rule that a presumption of negligence arises against a bailee for hire when it appears that the subject of the bailment has been injured or destroyed while within his custody by an accident such as in the ordinary course of things does not happen when a bailee uses due care."

The rule of those cases, by which the liability of a bailee is to be measured, is substantially the same as the rule which has previously been adopted by this court. *Patterson v. Wenatchee Canning Co.*, 53 Wash. 155, 101 Pac. 721; *Kingsley v. Standard Lumber Co.*, 84 Wash. 189, 146 Pac. 369. Had the facts shown that the contract between the appellant and the respondent was one for towage and not one of bailment, then the numerous authorities cited by the appellant in its brief would be apposite. There are no facts in the case from which the jury might reasonably have inferred that the contract was one of towage rather than one of bailment, and therefore it was not error for the court not to submit the case upon this hypothesis.

The court while instructing the jury upon the measure of the appellant's duty, in one place used the term "responsible skill and care." Subsequently, in the same instruction, it was said that the exercise of "reasonable care and caution

and maritime skill" is all that is required. This instruction follows the language used in the case of *Berry v. Ross*, 94 Me. 270, 47 Atl. 512, where the same inadvertence relative to the use of the word "responsible" instead of "reasonable" appears as in the instruction given. While the use of the word "responsible" is not accurate, the jury could not have been misled by it, in view of the fact that immediately afterwards the word "reasonable" was used in the same connection.

One of the disputed points in the case was whether or not the respondent had authorized or consented that the appellant might employ another tugboat company to do the towing in question. Upon this question the jury was instructed that if the respondent knew nothing of the arrangement for the use of the gasoline tug "Monaghan" and did not consent thereto, in that event, if the barge was damaged as claimed, the appellant would be liable. This instruction finds support in the following authorities: 36 Cyc. 107; *Sutcliff v. Seligman*, 121 Fed. 803; *Beach v. Raritan & Delaware Bay R. R. Co.*, 37 N. Y. 457. The challenge to the correctness of the instruction is not supported by any authority.

Error is sought to be predicated upon the refusal of the court to give certain requested instructions. So far as these requests correctly state the law applicable to the facts in the particular case, they were covered by the instructions given. We find no error in this regard.

The points already considered appear to us to be the principal ones. To here review the remaining points argued in the brief would unduly prolong this opinion and serve no useful purpose. It may be said, however, that we have considered all of the points urged, and in none of them do we find substantial merit.

The judgment will be affirmed.

MORRIS, C. J., FULLERTON, ELLIS, and CROW, JJ., concur.

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Statement of Case.

[No. 12247. Department One. May 27, 1915.]

W. H. GODDARD, *Respondent*, v. NORTHWESTERN MUTUAL
FIRE ASSOCIATION, *Appellant*.¹

INSURANCE—FORFEITURE—NONPAYMENT OF NOTES FOR PREMIUMS. Where an insurance policy does not prohibit payment of the premium by promissory note, and the company's agents issued a certificate of assignment to the insured reciting the payment of the premium, the acceptance of the note for the premium is a payment thereof; and nonpayment of such note at maturity does not work a forfeiture of the policy.

APPEAL AND ERROR—HARMLESS ERROR—EXCLUSION OF EVIDENCE. In an action on a fire insurance policy for a loss of wheat in a warehouse, in which the defense was that the plaintiff had procured the burning of the warehouse, the exclusion of evidence of the incendiary burning of another warehouse in which plaintiff had insured wheat in storage, and of the plaintiff's financial condition, is harmless, where there was no other substantial evidence of the incendiary origin of the fire; since the excluded evidence was insufficient to sustain the defense.

INSURANCE—EXTENT OF LOSS—SALVAGE. In an action for loss on a fire insurance policy, a verdict for the full market value of wheat lost in the burning of a storage warehouse was excessive, where, after the fire, the warehouseman sold a considerable quantity of damaged wheat, the larger portion of which was plaintiff's, and gave plaintiff credit thereon; and a proportionate reduction should be made in the amount of the verdict and judgment.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered April 29, 1914, upon the verdict of a jury rendered in favor of the plaintiff for \$5,523.89, in an action upon an insurance policy. Reversed, unless \$800 is remitted.

Corwin S. Shank, H. C. Belt, and F. L. Stotler, for appellant.

Thomas A. E. Lally (Charles R. Hill and Martin J. Gan-non, of counsel), for respondent.

¹Reported in 148 Pac. 893.

found in the terms of orders given upon third parties for the payment of premium installments falling due in the future, as in *Gilmore v. Continental Casualty Co.*, 58 Wash. 203, 108 Pac. 447; and *Pride v. Continental Casualty Co.*, 69 Wash. 428, 125 Pac. 787.

The doctrine of these decisions, and others involving similar forfeiture provisions to which our attention has been called by counsel for appellant, we think has no application to the facts of this case. While by the terms of this policy the rights of the insured are subject to forfeiture "when the insured is delinquent on any premium payment due on this policy," there is nothing in the policy, or the assignment of insurance made thereunder to respondent, preventing the payment of the premium by an interest bearing promissory note; nor is there anything in the policy, the assignment of insurance made to respondent or in the note itself, rendering the insurance ineffective by failure of respondent to pay the note at maturity. In *Arkansas Ins. Co. v. Cox*, 21 Okl. 873, 98 Pac. 552, 129 Am. St. 808, 20 L. R. A. (N. S.) 775, 783, the court had under consideration a situation like that here involved, and in disposing of the contention that the insurance had ceased to be effective because of the failure of the assured to pay the promissory notes at maturity given in settlement of the premium, said:

"Plaintiff executed two promissory notes in payment of the premium on the policy. These notes were past due and unpaid at the time of the institution of this suit, and defendant contends for forfeiture of the policy for the nonpayment of said notes, but neither the notes nor the policy make the validity of the policy contingent upon the payment of the notes. These notes were given by plaintiff and accepted by defendant in payment of the premium just as so much cash, and plaintiff is liable thereon for the amount of the same. Plaintiff in fact has tendered payment of the same to the company, which was refused. In the absence of stipulation in the note or in the policy of insurance that failure to pay the notes given in payment of the premium should operate as a forfeiture of the policy or a suspension of the risk, the

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policy will continue in force after the maturity of the notes although the same are not paid. Joyce on Insurance, vol. 2, § 1212."

In view of the recital in the certificate of assignment of the insurance to respondent, which is in effect an acknowledgment of the receipt of the premium in full, the delivery of the assignment to respondent, the acceptance of the promissory note containing no provision looking to termination of the insurance upon a failure to pay the note at maturity, and the absence of any such provision in the policy or certificate of assignment, we are of the opinion that the note was accepted as cash in full payment of the premium and that, therefore, its nonpayment at maturity had no effect whatever upon the insurance. The following decisions support this view. *Massachusetts Benefit Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *New England Mut. Life Ins. Co. v. Hasbrook's Adm'r*, 32 Ind. 447; *Michigan Mut. Life Ins. Co. v. Bowes*, 42 Mich. 19, 51 N. W. 962; *McAllister v. New England Mut. Life Ins. Co.*, 101 Mass. 558, 3 Am. Rep. 404; *Michigan Mut. Life Ins. Co. v. Hall*, 60 Ill. App. 159; *Life Ins. Co. of Virginia v. Hairston*, 108 Va. 832, 62 S. E. 1057, 128 Am. St. 989; 3 Cooley's Briefs on the Law of Insurance, p. 2267.

One of appellant's defenses set up in its answer was that respondent had himself procured the burning of the warehouse at Warner's Siding in which his wheat was stored. Testimony was received, over the objection of counsel for respondent, tending to show that near the time of the burning of this warehouse, there was discovered evidence of an attempt of an incendiary nature to burn the warehouse at Tekoa, a few miles distant from Warner's Siding, in which respondent had a quantity of wheat stored, which wheat he had fully insured. While this testimony shows quite convincingly that an attempt had been made to burn the Tekoa warehouse, it was not shown, at the time of the introduction of the testimony, that respondent had any connection there-

with. The testimony was introduced over the objection of counsel for respondent upon the promise of counsel for appellant that respondent's connection with the burning of the warehouse at Tekoa would be shown later in the trial. Thereafter, the court being of the opinion that there was no substantial evidence pointing to respondent's connection therewith, the evidence relating to such attempted burning of the Tekoa warehouse was, upon motion of counsel for respondent, stricken and the jury instructed to disregard it. Some effort was also made to show that the respondent was indebted to the Tekoa State Bank, by asking the cashier of that bank, who was a witness for appellant, as follows:

"I will ask you to state what indebtedness Mr. Goddard, the plaintiff in this case, owed to your bank during the month of April, 1912?"

Objection made to this question by counsel for respondent was sustained by the court. No other offer of evidence was made by counsel for appellant with a view of showing respondent's financial condition.

It is contended by counsel for appellant that the trial court erred in excluding the evidence tending to show the attempted burning of the warehouse at Tekoa, and in sustaining the objection to the question above quoted touching respondent's indebtedness to the bank. The real question here is, were these rulings prejudicial to the rights of appellant. A review of the entire record convinces us that there was no substantial evidence pointing to the fact that the burning of the Warner's Siding warehouse was of an incendiary nature, other than such possible inference as might be drawn from the attempted burning of the Tekoa warehouse in which respondent had a quantity of insured wheat stored, and the fact, which we assume for present purposes, that respondent was indebted to the Tekoa State Bank. With the evidence in this condition, we think the court should, in any event, have withdrawn from the jury the question of respondent's having procured the burning of the

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warehouse at Warner's Siding in which his grain was stored. The court's rulings complained of simply had this effect. These facts might have been admissible in connection with other facts which might have tended to show that respondent procured the burning of the Warner's Siding warehouse, but they are not, in our opinion, of themselves sufficient to sustain appellant's defense made upon that ground. We conclude that these rulings of the trial court were therefore without prejudice, even though the rejected evidence might have been admissible.

Contention is made in behalf of appellant that the verdict is excessive in amount and must be so held as a matter of law, in the light of the evidence touching the question of salvage and the proceeds thereof. This is one of the grounds upon which appellant's motion for new trial was made. It is plain that the jury awarded to respondent the full market value of all of his wheat in the warehouse, as though he had suffered a total loss of all of his wheat. The evidence is conclusive, indeed it is not contended otherwise, to the effect that the owner of the warehouse sold wheat which had been damaged by the fire, amounting to over three thousand bushels thereof, receiving therefor \$1,261.95. At the time of the fire, nearly all of the wheat in the warehouse belonged to respondent. It is impossible that the owner of the warehouse could have sold the quantity of damaged wheat it did without the larger portion of such damaged wheat being that of respondent. Indeed, a large portion of it was considered as belonging to respondent by the owner of the warehouse, since it gave respondent credit for at least several hundred dollars of the proceeds of such sales, though the total credit so given is not very certain. The sale of the damaged wheat was made by the owner of the warehouse with the express consent of respondent. We are of the opinion that appellant is entitled to have deducted from the total market value of the respondent's wheat, which was manifestly the basis of the jury's award, at least a large portion of the proceeds

received by the owner of the warehouse for the sales of the damaged wheat. The verdict is plainly excessive in a substantial amount. While it is not clear as to just what amount should be deducted from the verdict because of this excess, we are of the opinion that it is such as calls for a new trial, unless respondent shall remit from the amount of the verdict and judgment a portion thereof. We conclude that if respondent will, upon the going down of the remittitur, remit from the amount of the judgment the sum of \$800, the judgment may stand affirmed; otherwise appellant shall be granted a new trial by the superior court. Appellant will recover costs in this court. The cause is remanded to the superior court for such further proceedings as may be necessary, consistent with our conclusions herein stated.

MORRIS, C. J., HOLCOMB, CHADWICK, and MOUNT, JJ.,
concur.

[No. 12329. Department One. May 27, 1915.]

F. M. TAYLOR *et al.*, *Appellants*, v. CHICAGO, MILWAUKEE
& ST. PAUL RAILWAY COMPANY, *Respondent*.¹

RAILROADS—OPERATION—DAMAGES TO PROPERTY—LIABILITY—DAMNUM ABSQUE INJURIA. The jarring of buildings, the casting of smoke, sparks and soot on premises, and the emission of gases and fumes, necessarily incident to the ordinary operation of a railroad through a city, which results in depreciating the value of neighboring property is *damnum absque injuria*, in the absence of negligence on the part of the railway company.

EMINENT DOMAIN—RIGHT TO COMPENSATION—DAMNUM ABSQUE INJURIA. The constitutional guaranty (Const., art. 1, § 16) that no private property shall be taken or damaged without just compensation is applicable to injuries arising from the commission of some actionable wrong, and does not authorize compensation for depreciation in value caused by a legal act which is in law *damnum absque injuria*.

¹Reported in 148 Pac. 887.

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Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered May 4, 1914, in favor of the defendant, upon the pleadings, dismissing an action for damages to property, by the construction and operation of a railroad. Affirmed.

Nuxum, Clark & Nuxum (Geo. H. Armitage, of counsel), for appellants.

F. M. Dudley, G. W. Korte, and F. M. Barkwill, for respondent.

PARKER, J.—The plaintiffs commenced this action in the superior court for Spokane county, seeking recovery of damages which they claim result to their property situated in the city of Spokane from the “ordinary operation” of the defendant’s line of railway in close proximity thereto. The cause was disposed of in favor of the defendant by judgment of dismissal rendered in the superior court upon motion for judgment upon the pleadings. From this disposition of the cause, the plaintiffs have appealed to this court.

The cause comes to us presenting the same questions as if demurrer to appellants’ complaint for want of facts therein alleged constituting a cause of action had been sustained by the trial court and appellants had elected to stand upon their complaint and declined to plead further. No contention is made that by this manner of disposition of the cause appellants were deprived of opportunity to amend their complaint. The question then is, Does the complaint state facts constituting a cause of action against respondent? The controlling facts, as disclosed by the allegations of the complaint, may be summarized as follows:

Respondent is a common carrier, owning and operating lines of steam railways in the state of Washington and the northwestern states, one of which lines runs through the city of Spokane past the property of appellants. Appellants’ property claimed to be damaged is at its nearest point

to the track of respondent's railway approximately sixty feet therefrom. The cause, nature and extent of appellants' claimed damage is alleged in their complaint to be as follows:

"That in the ordinary operation of said road the said defendants use large and heavy engines and trains of cars, the motor power of said engines being steam, said steam being generated by the use of coal, and that in the operation of said road the said engines of the said defendants emit large volumes of smoke, cinders, sparks and soot, and that the running of the trains of the defendants, as aforesaid, over said road as aforesaid raises great clouds of dust and dirt, jars the surrounding property, and especially the property of these plaintiffs, so that large cracks have appeared in the ceilings and walls of the houses situate on the property of the plaintiffs and owned by plaintiffs, and the doors and windows of said houses rattle, the dishes and other things on the shelves in the houses of plaintiffs rattle, and the jar is so great that it awakens persons from sound sleep while occupying beds in the houses of plaintiffs situate on the property aforesaid.

"That the prevailing winds in the city of Spokane, wherein the property of plaintiffs is situated, as aforesaid, and wherein the railroad of the defendants is operated, as aforesaid, are from southwest to northeast, and the smoke, cinders, and soot so emitted from the engines of the defendants herein, and the dust, and dirt raised by the ordinary operation of the road of the defendants herein, as aforesaid, has and does penetrate into the houses of the plaintiffs, covering the furniture, walls, ceilings, carpets and curtains in said houses; that said smoke, cinders, soot, sparks, dirt and dust cover the lawn surrounding the said houses of plaintiffs, and cover the property of plaintiffs herein described, and frequently fires are started upon the property of the plaintiffs herein described from sparks emitted from said engines of said defendants; that said smoke, cinders, soot, sparks and fires so started therefrom injure the trees, shrubbery, gardens and vegetation in the yards of the plaintiffs on their said lot, as aforesaid; that gases coming from the operation of said engines of defendants penetrate through

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the buildings on said property, as aforesaid, and render the same uninhabitable.”

The complaint contains no allegations pointing to any negligence on the part of respondent in the operating of its railway. It is not claimed—indeed, we think it could not be, with any show of reason in the light of these allegations,—that respondent has ever used other than the commonly used facilities of steam railways, or that it has ever negligently used such facilities, or that the injury to appellants’ property is other than a result necessarily incidental to the proper operation of respondent’s railway.

Our decision in *DeKay v. North Yakima & Valley R. Co.*, 71 Wash. 648, 129 Pac. 574, it seems to us, is decisive of this case in respondent’s favor, unless the holding there announced is to be overruled. We there held, in effect, that the casting of smoke and cinders from the locomotives of the railway company on the adjoining property of DeKay, and the jarring of his property and buildings by the operation of the railway company’s trains, all of which resulted in depreciating the value of his property, was, in the absence of negligence on the part of the railway company, *damnum absque injuria*. Our conclusion reached in that decision was rested upon the doctrine announced in the last paragraph, commencing with the word “but,” of the following quotation from the decision in *Smith v. St. Paul, Minn. & M. R. Co.*, 39 Wash. 355, 81 Pac. 840, 109 Am. St. 889, 70 L. R. A. 1018:

“The jarring of the earth of respondents’ lots and the casting of soot and cinders thereupon, and the emission of smoke physically injuring property, are injurious physical effects to the *corpus* of respondents’ property, which, we think, come within the scope of the term ‘damaged,’ as used in the constitutional provision. If a railroad company cannot carry on its business upon its own property without necessarily disturbing the physical conditions of other property, it is evident that such company has not acquired sufficient property for the conduct of its business, and it

should be required to pay such damages as the actual physical disturbance of the neighboring property entails thereupon. But the ringing of bells, sounding of whistles, rumbling of trains, and other usual noises, and the emission of smoke, gases, fumes, and odors are necessarily incidental to the proper operation of the road, and when not resulting from negligence, are such consequential injuries as must be held to have been anticipated by any one acquiring property in or about such a city, and are regarded as *damnum absque injuria*."

Counsel for appellants now insist that our decision in the *DeKay* case should be limited in its effect by the observation made by the court in the first part of the above quotation from the *Smith* case, or that the holding in the *DeKay* case should be overruled, in so far as it denies the right of recovery of damages resulting in the jarring of adjoining property or the casting of physical substance thereon in the nature of soot or cinders. We may concede that our decision in the *DeKay* case is somewhat out of harmony with the first part of the above quotation from the *Smith* decision, and to that extent the *DeKay* decision was in effect an overruling of the *Smith* decision. The above quoted language from the *Smith* decision, when read as a whole, we now regard as somewhat unfortunate. Upon reflection we think it will readily appear that the rule announced in the first portion of the above quoted language is inconsistent with that announced in the latter portion thereof, the latter announcing the rule upon which we rested our decision in the *DeKay* case. The learned writer of the decision in the *Smith* case seems to have regarded damages resulting from the jarring of adjoining property and the casting of soot and cinders thereon, recoverable because of the physical nature of such substance and the resulting physical injury to such property; and thus to distinguish the right of recovery for such injury from injuries caused by the things mentioned in the last paragraph of his observations above quoted. We find, however, mentioned in the last paragraph as causes of

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damage for which recovery may not be had, "smoke," "gases" and "fumes." But manifestly, these are no less physical, either in their composition or effect, than "soot" or "cinders," nor is their effect less of a physical nature than that of the jarring of adjoining property. It seems to us that the problem, in its last analysis, is to be solved, not by the nature of the cause or the result of the injury, but by the proper answer to the question of whether or not the injury is necessarily the result of the proper operation of the railway. It is not so much the nature or extent of the injury resulting to appellants' property as it is the right of the railway company to do the things resulting in the injury complained of. Respondent acting within its rights and being free from negligence, the resulting injury to adjoining property does not give rise to an actionable wrong in favor of the owner of such property. The authorities reviewed and extensively quoted from the *Smith* decision support this view. For instance, there is quoted in that decision, with apparent approval, from *Bennett v. Long Island R. Co.*, 181 N. Y. 481, 74 N. E. 418, the following:

"The rumble of trains, the clanging of bells, the shriek of whistles, the blowing off of steam, the discordant squeak of wheels in going around the curves, the emission of smoke, soot, and cinders, all of which accompany the operation of steam cars, are undoubtedly nuisances to the neighboring dwellings in the popular sense, but as they are necessarily incident to the maintenance of the road, they do not constitute nuisances in the legal sense, but are regarded as protected by the legislative authority which created the corporation and legalized its corporate operations. Nor does the legal nature of such annoyances change as traffic increases them in volume and extent."

Quotations of similar import are made in the *Smith* decision from *Aldrich v. Metropolitan W. S. El. R. Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237; *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. 659; *Pennsylvania R. Co. v. Lippincott*, 116 Pa. St. 472,

9 Atl. 871, 2 Am. St. 618, and *Austin v. Augusta T. R. Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755. In *Carroll v. Wisconsin Cent. R. Co.*, 40 Minn. 168, 41 N. W. 661, dealing with claimed damages of the nature here sought to be recovered for, the court observed:

"Railroads are a public necessity. They are always constructed and operated under authority of law. They bring to the public great benefits: to some persons more, to other persons less. The operating them in the most skillful and careful manner causes to the public necessary incidental inconveniences, such as noise, smoke, cinders, vibrations of the ground, interference with travel at the crossings of roads and streets, and the like. One person may suffer more from these than another. For instance, one whose premises lie within a hundred feet of the railroad will feel the inconveniences in a greater degree than one whose premises are at the distance of a thousand feet; and one who has to pass many times a day along a street crossed by a railroad suffers more inconvenience from it than one who seldom has occasion to pass. But the difference is only in degree, not in kind. Such inconveniences are common to the public at large. If each person had a right of action because of such inconveniences, it would go far to render the operating of railroads practically impossible."

In *Beseman v. Pennsylvania R. Co.*, 50 N. J. 235, 13 Atl. 164, dealing with a similar problem, Chief Justice Beasley, speaking for the court, observed:

"That this proposition, on which the plaintiff's case rests, is a most momentous one, is at once apparent. If it should be sustained, an illimitable field of litigation would be opened. If a railroad, by the necessary concomitants of its use, is an actionable nuisance with respect of the plaintiff's property, so it must be as to all other property in its vicinity. It is not only those who are greatly damnified by the illegal act of another to whom the law gives redress, but its vindication extends to every person who is damnified at all—unless, indeed, the loss sustained be so small as to be unnoticeable by force of the maxim *de minimis non curat lex*. The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are wide spreading, im-

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pairing, in a sensible degree, some of the usual conditions upon which depend the full enjoyment of property in their neighborhood; and, consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested. Such a doctrine would make these companies, touching such land-owners, general tortfeasors. Their tracks run for miles through the cities of the state, and every land-owner on each side of the track would be entitled to his action; and so in the less populated districts, each proprietor of lands adjacent to the road would have a similar right, and thus the litigants would be numbered by thousands. It is questionable whether the running of railroads would be practicable if subjected to such a responsibility."

See, also, *Randle v. Pacific Railroad*, 65 Mo. 325; *Thomason v. Seaboard Air Line R. Co.*, 142 N. C. 300, 55 S. E. 198; *Atchison, T. & S. F. R. Co. v. Armstrong*, 71 Kan. 366, 80 Pac. 978, 114 Am. St. 474, 1 L. R. A. (N. S.) 113; *Hyde v. Minnesota, D. & P. R. Co.*, 29 S. D. 220, 136 N. W. 92.

Nor is this doctrine fraught with any such injustice as a superficial view thereof might suggest. Let us suppose for a moment that there were no railroads in or near the city of Spokane. What then, it may well be asked, would appellants' property, which is here claimed to be injured, be worth? The logic of appellants' contention given its ultimate effect would in all probability destroy what is probably the greatest single potency which lends value to their property. Without railroads it is highly probable that the value of all the property within the present limits of the city of Spokane would only be that of a comparatively small town or village. While the ordinary operation of such railways may seemingly damage much adjoining property, it is to be remembered that, in the vast majority of cases, railways are the most potent influence lending value to such property. A more nearly correct view, probably, is that appellants' property, by reason of the presence of this and other railways in and through

the city of Spokane, is measurably *less benefited* by the presence of such railways than some other property within the city which may be so situated as to reap the benefits and not suffer the inconveniences which in a measure also attend the presence of the railways. A thought akin to this was expressed by us in *Larned v. Holt & Jeffery*, 74 Wash. 274, 133 Pac. 460, 46 L. R. A. (N. S.) 635, where we said, touching the inconvenience and injury to property caused by carrying on of a street improvement:

"It is apparent to the most casual observer that property and business locations in our centers of population are desirable and derive well known advantages from being so situated. The density of population which renders such locations valuable also renders the more necessary public improvements of the nature here involved, to the end that such advantages may be more fully enjoyed. The making of such public improvements necessarily results in more or less temporary inconvenience, and even damage to property and business in their neighborhood while being constructed. Aside from acts of negligence on the part of the public authorities in constructing such improvements, owners of property and business so temporarily inconvenienced or even damaged must bear such burdens as an incident to the enjoyment of the advantages which their locations give them."

See, also, *Hieber v. Spokane*, 73 Wash. 122, 131 Pac. 478.

Some contention is made rested upon the eminent domain provision of our constitution that "no private property shall be *taken or damaged*" without just compensation. Counsel seem to proceed upon the theory that appellants are in effect simply seeking compensation from respondent by reason of its exercising the right of eminent domain, and that therefore the word "damaged" as used in our constitution gives them a right of recovery for the injuries they here claim to have received. This problem seems to have been well answered in *Austin v. Augusta T. R. Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755, where, dealing with a similar problem under an eminent domain constitutional provision in substance the same as ours, and where damages were

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claimed of the same nature as those here claimed, Chief Justice Simmons, speaking for the court, said:

"Plaintiff insists that, as the market value of her lot had been diminished, in consequence of the operation of the railroad, she is entitled to recover therefor, by virtue of the provision in the constitution that 'private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.' In a popular sense, the word 'damage' does frequently mean depreciation in value, whether such depreciation is caused by a wrongful or a lawful act; but in statutes or other legal instruments giving compensation for 'damages' the word always refers to some actionable wrong—some loss, injury, or harm which results from the unlawful act, omission, or negligence of another. In this sense, and as a well-defined law term, it was used in the constitution, to give the owner of private property compensation for the actionable wrong whereby his property had been damnified; but it did not give him compensation for depreciation in value caused by any legal act, since in law such an act was innocent, and therefore harmless, or, if not actually harmless, '*damnum absque injuria*.' There is nothing in the language of the constitution, or in the debates or in the proceedings of the convention, which shows any intent to enlarge its definition, or to make it mean more than it had always meant as a law term."

In *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. 659, where a similar problem was involved under a constitutional provision like ours, except that it used the word "injury" instead of "damages," Justice Paxson, speaking for the court, said:

"The language of the constitution is not equivocal, and is entirely free from ambiguity. The framers of that instrument understood the meaning of words, and many of them were among the ablest lawyers in the state. Two of them occupy seats upon this bench. Hence, when they extended the protection of the constitution to persons whose property should be injured or destroyed by corporations in the construction or enlargement of their works, we must presume they meant just what they said: that they intended to give a remedy merely for legal wrongs, and not for such

injuries as were *damnum absque injuria*. Among the latter class of injuries are those which result from the use and enjoyment of a man's own property in a lawful manner, without negligence and without malice."

It is worthy of note that this language from the Georgia and Pennsylvania courts is quoted with approval in *Smith v. St. Paul, Minn. & M. R. Co.*, *supra*. In the late case of *Hyde v. Minnesota, D. & P. R. Co.*, 29 S. D. 220, 136 N. W. 92, the question was reviewed at length in the light of the provision of the constitution of South Dakota, in substance the same as ours, and a conclusion reached in harmony with the Georgia and Pennsylvania decisions. We are of the opinion that this eminent domain constitutional provision does not change or lessen the force of the doctrine of *damnum absque injuria*.

The following decisions are of interest in this connection though readily distinguishable, we think, from this case: *Farnandis v. Great Northern R. Co.*, 41 Wash. 486, 84 Pac. 18, 111 Am. St. 1027, 5 L. R. A. (N. S.) 1086; *Keil v. Grays Harbor & P. S. R. Co.*, 71 Wash. 163, 127 Pac. 1113, and *Patrick v. Smith*, 75 Wash. 407, 134 Pac. 1076, 48 L. R. A. (N. S.) 740. None of these decisions have any reference to the ordinary operation of a steam railway and the incidental damage resulting to abutting property therefrom. The *Farnandis* case deals with a question of damage resulting from the sinking and subsiding of the earth caused by the construction of a tunnel by a railway company, and not with injuries resulting from the operation of the railway. The *Keil* case deals with the question of the building of a steam railroad in a public street as being an additional burden, to the injury of abutting property. There was not involved any question of injury to abutting property of the nature here involved, but only the right of the railroad company to occupy the street as against the rights of abutting property. The right of the property owner involved was not different in principle than as if the railroad were being actually

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built over his property. The *Patrick* case deals with the question of damage resulting from blasting in the construction of a railway. That decision was rested upon the practically uniform holdings of the authorities that the casting of debris upon the land of another by blasting and damage resulting therefrom gives the landowner a right of action therefor, regardless of negligence in the doing of the blasting.

We conclude that the correct rule is announced in *DeKay v. North Yakima & Valley R. Co.*, *supra*, and the conclusions there reached are controlling in favor of respondent as to all the claims of damages made against it in this case, in view of the fact that no act of respondent is charged to have been accompanied by negligence, nor is it charged with any act other than is necessarily incidental to the proper operation of its railway. In so far as observations made in the decision in *Smith v. St. Paul, Minn. & M. R. Co.*, *supra*, are inconsistent with this conclusion, we must now regard them as no longer controlling.

The judgment is affirmed.

MORRIS, C. J., HOLCOMB, MOUNT, and CHADWICK, JJ., concur.

[No. 12409. Department Two. May 27, 1915.]

C. M. HAYS, *Appellant*, v. MONTESANO MILL COMPANY
et al., *Respondents*.¹

MECHANICS' LIENS — MATERIALMEN — NOTICE—STATUTE—"AGENT."
Under 3 Rem. & Bal. Code, § 1133, requiring, in order to obtain a mechanics' lien, the giving of written notice to the owner of the building of the furnishing of any materials or supplies, within five days after the first delivery of such material "to any contractor or agent," the term "agent" must be construed as meaning agent of the owner and not of the contractor; and includes a lessee in possession under obligation to make the improvements, as agent of the owner.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered January 24, 1914, upon sustaining a demurrer to the complaint, dismissing an action to foreclose a materialman's lien. Affirmed.

W. H. Abel, for appellant.

Bridges & Bruener, for respondent Montesano Lumber & Manufacturing Company.

FULLERTON, J.—On May 18, 1911, the respondent Montesano Lumber & Manufacturing Company, being then the owner of certain mill property, leased the same to J. W. Sumrall, A. B. Crosier, and A. K. Foss, for a term of three years, at a rental of \$300 per month. The lease was in writing and contained, among others, the following conditions:

"It is agreed that whereas the said mill at this time needs new machinery and equipment, that second parties shall furnish as advance payment upon said rent, certain machinery and equipment, a list of which has this day been agreed upon, which machinery and equipment, with the cost of installation, shall not exceed ten thousand (\$10,000) dollars, and up to that amount they shall be allowed a credit upon the rental to be paid by them, but for any machinery, or equipment, or cost of installation beyond that amount, then they shall

¹Reported in 148 Pac. 881.

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receive no credit upon said rent due under this lease. To entitle second parties to said credit or machinery, equipment and cost of installation, the first party will be consulted concerning the plan, character and class of the machinery furnished and installed; that upon such installation the machinery and equipment so furnished shall be and become the property of the lessor and therefor the lessees shall receive credit at the rate of three hundred (\$300) dollars per month, which shall be applied so far as may be towards the advance payment of said rent."

Subsequently, with the consent of the lessor, the lessees assigned their interests in the lease to the defendant Montesano Mill Company, who assumed the obligations due from the original lessees therein. Thereafter the Montesano Mill Company purchased of the Crane Company, and installed in the mill, certain machinery of the character of that described in the list mentioned in the lease, and of the value of \$1,090.08. It subsequently failed to pay for the machinery according to the terms of the contract of purchase, and the vendor thereof filed a lien against the fee of the leased property for the amount of the claim, pursuant to the statutes relating to liens of mechanics and materialmen. After the filing of the lien, the Crane Company assigned the same to the appellant, who instituted the present action to foreclose the same. Foreclosure was denied her in the court below and, from the judgment entered, this appeal is prosecuted.

The trial judge denied the right of lien for the reason that the company furnishing the materials for which the lien is claimed did not deliver to the owner of the property the notice required by § 1133 of 3 Rem. & Bal. Code. This section reads as follows:

"Every person, firm or corporation furnishing materials or supplies to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, well, fence, machinery, railroad, street railway, wagon road, aqueduct to create hydraulic power, or

any other building, or any other structure, or mining claim or stone quarry, shall, not later than five (5) days after the date of the first delivery of such materials or supplies to any contractor or agent, deliver or mail to the owner or the reputed owner of the property on, upon or about which such materials or supplies are to be used, a notice in writing, stating in substance and effect that such person, firm or corporation has commenced to deliver materials and supplies for use thereon, with the name of the contractor or agent ordering the same, and that a lien may be claimed for all materials and supplies furnished by such person, firm or corporation for use thereon; and no further notice to the owner shall be necessary. No materialmen's lien shall be enforced unless the provisions of this act have been complied with."

It is the appellant's contention that the statute is inapplicable to the conditions here existing. She contends that where a lessee agrees to make permanent improvements on the leased property in lieu of rent, the lessee is not a contractor in the sense in which that term is used in the lien statutes, but is the agent of the owner for the purpose of making the improvements, and as such agent may subject the fee to the claims of materialmen.

But since the statute requires the notice to be given the owner of the property sought to be charged with the lien when the materials are ordered by and delivered to "any contractor or agent," the notice must be given to the owner in order to perfect the lien even when the materials are ordered by his agent, unless it is to be held that the "agent" referred to in the statute is the agent of the contractor, and not the agent of the owner of the property. This we cannot hold. Plainly the agent referred to is the agent of the owner of the property. There may be some inconsistency in providing that the owner shall receive notice of his agent's acts in order to be bound by them, but it must be remembered that the right to a materialman's lien is statutory. Without a statute granting it, no such right exists. When, therefore, the legislature grants the right, it may annex such conditions

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thereto as it chooses, and the courts must give them force however contrary the provisions may seem to be to the general rules of law. But we see nothing out of the ordinary in the particular provision. The notice is intended for the protection of the owner. It is intended to prevent the enforcement of false claims against his property, and is just as much necessary for that purpose whether the order for the materials be given by his agent or by his contractor. The rule works no hardship upon the materialman. The requirement of the statute is simple, and he has but to comply therewith in order to secure its benefits.

The judgment is affirmed.

MORRIS, C. J., CROW, ELLIS, and MAIN, JJ., concur.

[No. 12685. Department Two. May 27, 1915.]

THE STATE OF WASHINGTON, *on the Relation of C. G. Crombie, Plaintiff, v. THE SUPERIOR COURT FOR KING COUNTY, Respondent.*¹

DIVORCE—PAYMENT OF ALIMONY PENDENTE LITE—TRIAL. Where the husband is in default in paying alimony pending divorce proceedings against his wife, it is not an abuse of discretion on the part of the trial court to refuse to proceed with the cause upon the merits until the order requiring the payment of alimony is complied with.

MANDAMUS—PROCEEDINGS—QUESTIONS PRESENTED. In an action of mandamus to compel the superior court to proceed with the trial of a divorce suit, which the court was refusing to do because of the husband's failure to comply with an order for the payment of alimony *pendente lite*, matters pertaining to the financial ability of the husband, the motives of the wife, and kindred questions, will not be reviewed.

Application filed in the supreme court March 15, 1915, for a writ of mandamus to compel the superior court for

¹Reported in 148 Pac. 882.

King county, Albertson, J., to proceed with the trial of a cause. Denied.

Frank A. Paul, for relator.

Griffin & Griffin, for respondent.

MAIN, J.—This is an original application in this court for a writ of mandamus to compel the superior court for King county to proceed to a final judgment in a divorce action.

The facts, so far as pertinent to the present inquiry, are in substance as follows: On the 7th day of March, 1914, the relator, C. G. Crombie, was married to his present wife, Jennie M. Crombie. On November 20, 1914, the relator brought an action for divorce against his wife. Mrs. Crombie, on November 24, 1914, answered the complaint with certain admissions and denials, and a cross-complaint. On January 16, 1915, upon the petition of Mrs. Crombie, the superior court entered an order directing that the husband pay \$60 per month alimony to his wife *pendente lite*. The first installment of this alimony was not paid when due. Prior to the time when the second installment became due, Mrs. Crombie caused her husband to be cited to show cause why he should not be committed for contempt for failure to comply with the order. On March 3, 1915, the court adjudged the husband to be in contempt for his failure to pay temporary alimony, and he was ordered committed to the county jail until he should comply with the order, or be discharged by due process of law. Mr. Crombie on the same day appealed from the order of commitment, and superseded the order by a bond. The divorce action, under the superior court rules, was, on January 12, 1915, noted to be placed upon the trial calendar. On March 5, 1915, Mrs. Crombie made a motion that the case be stricken from the trial calendar until such time as the husband should comply with the order requiring him to pay temporary alimony. This motion was granted on March 8, 1915. On March 9, 1915, a peti-

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tion was filed in the superior court asking that the cause be restored to the trial calendar, and that it be set for trial in the regular course prescribed by the court rules. The trial court declined to grant the prayer of this petition. The relator then made the present application for the purpose of compelling the trial court to reinstate the case upon the trial calendar, and to set the same for trial upon a day certain, and proceed to final judgment in the cause.

The controlling question is whether the trial court abused its discretion in refusing to proceed with the trial of the cause until the relator had complied with the order of the court relative to the payment of temporary alimony. Or in other words, did the relator have the right to proceed to a trial upon the merits after appealing from the order committing him for contempt for failure to pay the alimony, and superseding the order by a bond. The rule, as supported by the authorities is that where the husband is in default in paying alimony *pendente lite*, it is not an abuse of discretion on the part of the trial court to refuse to proceed with the cause upon the merits until the order requiring the payment of such alimony is complied with. Spencer, Law of Domestic Relations, § 427; 2 Bishop, Marriage, Divorce & Separation, § 981; 14 Cyc. 755; *Purcell v. Purcell*, 3 Edw. Ch. (N. Y.), 194; *Mangels v. Mangels*, 6 Mo. App. 481; *Winter v. Superior Court*, 70 Cal. 295.

In the text of Bishop, *supra*, the rule is stated as follows:

"But a plaintiff husband, destitute both of funds and ability, will in a proper case have his suit suspended until he can do justice to his defending wife. If he cannot alimant her and give her the means of defense, he cannot have his divorce. . . ."

If the husband, after appealing and superseding the order for temporary alimony, has a right to proceed with the trial of the case upon the merits pending the appeal from the order requiring the payment of alimony *pendente lite*, he

would defeat, or could defeat, the purpose for which such money was awarded. Much is said in the brief relative to the financial ability of the husband, the motives of the wife, and other kindred questions. But these are questions which cannot be reviewed in this proceeding. If the amount of alimony adjudged is not reasonable, or if the wife is actuated by improper motives, these and kindred questions must be determined upon the appeal from the order directing the payment of temporary alimony.

The writ will therefore be denied.

MORRIS, C. J., ELLIS, FULLERTON, and CROW, JJ., concur.

[No. 12438. Department Two. May 27, 1915.]

INDEPENDENT BREWING COMPANY, *Respondent*, v.

P. MCCRIMMON *et al.*, *Appellants*.¹

APPEAL AND ERROR—REVIEW—NEW TRIAL. The granting of a new trial in a cause tried by a jury, on the ground of insufficiency of the evidence, rests solely in the discretion of the trial court, which will be reviewed on appeal only for manifest abuse.

Appeal from an order of the superior court for Pierce county, Chapman, J., entered July 29, 1914, granting a new trial, after the verdict of a jury rendered in favor of the defendants, in an action on contract. Affirmed.

L. C. Stevenson, for appellants.

Bates, Peer & Peterson, for respondent.

FULLERTON, J.—On November 28, 1911, the respondent, Independent Brewing Company, and the appellant McCrimmon entered into a written agreement, by the terms of which McCrimmon was given the exclusive agency to sell, for a stated period, the respondent's product in the city of Tacoma and the surrounding territory. The appellants Bell,

¹Reported in 148 Pac. 787.

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Alfred and Pickford, by writing, guaranteed the faithful performance of the contract on the part of McCrimmon. Subsequently the relations of the parties were discontinued, and the respondent, claiming a balance due upon the contract, brought this action against McCrimmon and his guarantors to recover the same. McCrimmon admitted a balance due, but counterclaimed because of an alleged breach of the contract. The other appellants defended on the ground of material subsequent alterations in the contract made without their knowledge or consent. On the issues framed, a trial was had before a jury, which returned a verdict in favor of McCrimmon on his counterclaim in the sum of \$1,527.80, and in favor of the other appellants to the effect that there had been a substantial change in the original contract without the consent of the guarantors. Judgment was entered on the return of the verdict in accordance therewith. In due time after the return of the verdict, the respondent moved for a new trial, which motion the trial court granted as to all of the appellants. This appeal is prosecuted from the order granting the new trial.

The motion for a new trial was based upon some six of the eight several statutory grounds, among which were included the grounds of excessive damages appearing to have been given under the influence of passion and prejudice, and insufficiency of the evidence to justify the verdict. The order of the court was general, and did not specify the particular ground or grounds upon which it was based. An inspection of the record shows that, on all of the material matters necessary to entitle the appellants to recover, the evidence was conflicting. Indeed, to our minds, the evidence seems not even to preponderate in favor of the verdict, not only as to the amount of the recovery, but even as to the right to a recovery at all. Under these circumstances, we can see no reason which would justify us in disturbing the order of the court. The power to grant a new trial in a cause tried by a jury on the ground of insufficiency of the evidence is a

power that rests solely in the trial court. It is given it in the interests of justice; it is given to prevent the perpetuation into judgments of exaggerated and unfounded verdicts that juries are sometimes unaccountably wont to return. Whether, therefore, the trial court will or will not grant a new trial for these causes in a given case is a matter within its discretion, which will be reviewed on appeal only for manifest abuse. *Bender v. Rinker*, 21 Wash. 636, 59 Pac. 504; *Hughes v. Dexter Horton & Co.*, 26 Wash. 110, 66 Pac. 109; *Best v. Seattle*, 50 Wash. 533, 97 Pac. 772; *Holloway v. Savage*, 68 Wash. 614, 123 Pac. 1021; *Bank of Commerce v. Newberry*, 71 Wash. 422, 128 Pac. 1064.

We find no abuse of discretion in the order appealed from, and it will stand affirmed.

MORRIS, C. J., MAIN, ELLIS, and CROW, JJ., concur.

[No. 12084. Department Two. May 29, 1915.]

HILLYARD LUMBER COMPANY, *Appellant*, v. J. E. CODD *et al.*,
Respondents.¹

MECHANICS' LIENS—NOTICE TO OWNER—STATUTE—SUFFICIENCY OF EVIDENCE. Under 3 Rem. & Bal. Code, § 1133, providing that every person furnishing material or supplies to be used in the construction of a building shall, within five days after such material or supplies are delivered to any person or contractor, "deliver or mail" to the owner a duplicate statement of all such materials, compliance with the requirement of mailing notice is inferentially established by testimony of plaintiff's secretary that, while he could not swear positively that the street address had been placed upon the envelope, he believed it was, basing his opinion on the fact that, on the carbon copy of the notice of statement in evidence, he had made a memorandum "Mail to E. 525 Sinto, Spokane," which he thought he must have done at the time he wrote the address on the envelope; since, in the absence of conflicting evidence, the question is, what is the inference to be drawn from the undisputed testimony.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered October 31, 1913, upon find-

¹Reported in 149 Pac. 30.

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ings in favor of the defendants, in an action to foreclose mechanics' liens, tried to the court. **Reversed.**

C. C. Upton, for appellant.

Codd, Hutchinson & Codd, Danson, Williams & Danson (George D. Lantz, of counsel), for respondents.

MAIN, J.—The Spokane Hardwood Floor Company and others instituted this action against the defendants for the purpose of foreclosing certain mechanics' and materialmen's liens upon lot 2, block 22, Second Sinto addition to Spokane. The appellant not being made a party, came into the action by filing a complaint in intervention wherein it sought to foreclose its lien for lumber and materials furnished and used in the erection of a dwelling house upon the above described premises. The amount of its claim was \$1,035.01, with interest from November 29, 1912, together with the expenses of preparing and filing its lien, and an attorney's fee and costs.

The complaint is in the usual form, and alleges the giving of notice to the defendants as owners of the premises, in the manner required by law, that it was furnishing the materials for which a lien is claimed. The defendants answered, denying the principal allegations of the complaint. Upon the issues thus made, the cause was tried to the court without a jury. The principal controversy was over the question of the giving of notice by the intervener to the defendants, as required by the statute, that it had commenced to deliver materials upon the premises of the defendants.

Albert M. Orr, the secretary and treasurer of the intervener, testified that the notice was mailed on July 18, 1912; that the bookkeeper on that date had commenced to make out the notice by filling in the usual blank form with the date and "J. E. Codd, Spokane, Wn.," but not having the description of the real estate, did not complete the notice; that he, Orr, afterwards procured the lot and block numbers, and

completed the notice by filling in the blanks and signing it, a carbon copy of which was introduced in evidence; that the original was placed in an envelope upon which the postage was prepaid, addressed to J. E. Codd, Spokane, Washington, and mailed at the post office in Hillyard, Washington. As to whether the street address where the defendant J. E. Codd was then residing was upon the envelope at the time it was mailed, Mr. Orr, in substance, testified that he could not swear positively that this number (East 525 Sinto Avenue) was upon the envelope, but that he believed it was; that he had no independent recollection upon the subject, but based his opinion upon the fact that, on the carbon copy of the notice introduced in evidence, he had made a memorandum in these words: "Mail to E. 525 Sinto, Spokane." Upon cross-examination, with reference to the making of this memorandum, the respondents elicited the following:

"Q. Did you write this after you sent the other one or did you write it before? A. I could not say as to that; I think I wrote it perhaps the same time that I wrote the address on the envelope—just made a note on it so I would know where it went to. Q. When you were making up the notice, didn't you look up the address of this man and write it on your notice slip? A. I don't recollect where I got the address, but it is evidently on the envelope or else I would not have put it on the bottom there, but I don't know whether it was on the original of that or not. Q. Well, do you know whether it was on the envelope then or not? A. I could not swear positively it is, no, but then I would not have any reason to put it down there if I had not had it on the envelope."

The defendant, J. E. Codd, testifying in his own behalf, denied that he received the notice. His wife did not testify at all. J. W. Codd, the brother of J. E. Codd, testified that he had resided at this number from June to November 30, 1912, and had never seen any such notice, and had never heard J. E. Codd or his wife mention having received it. The evidence does not show that there was no other person re-

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siding at E. 525 Sinto avenue into whose possession the letter might have come. J. E. Codd admitted having received the notices of all the other lien claimants to the action.

The court found, among other things, in substance, that the notice was mailed by the intervener on July 18, 1912; "that the envelope . . . was addressed to J. E. Codd, Spokane, Washington;" that J. E. Codd was on this date residing at E. 525 Sinto avenue, in Spokane, which fact was known to the intervener at the time of mailing the notice, and that this address of J. E. Codd was so given in the city directory for 1912. The court concluded that the intervener was not entitled to a lien for any amount upon the real estate mentioned, and entered a judgment against the intervener and in favor of the defendants for costs, and releasing and discharging the real estate from its lien. The intervener has appealed.

The controlling question in this case is whether the trial court in concluding that the envelope did not contain the street and number, drew a proper inference from the undisputed testimony. The statute relative to the giving of notice, 3 Rem. & Bal. Code, § 1133, provides that every person furnishing material or supplies to be used in the construction of a building shall, within five days after such material or supplies are delivered to any person or contractor, "deliver or mail" to the owner, or reputed owner, of the property, on, upon or about which said materials or supplies are to be used, a duplicate statement of all such materials or supplies delivered to any contractor or person to whom any such materials or supplies have been sold or delivered, and no materialmen's lien shall be filed or enforced unless the provisions of this act have been complied with. It is not claimed that if the envelope had upon it the street and number it would not conform to the statutory requirement. While the witness Orr did not testify unequivocally and positively that he placed upon the envelope the street and number prior to the time he mailed it, yet we think this is the only reasonable

inference to be drawn from his testimony. The duplicate copy of the notice, which was introduced in evidence, shows a memorandum in pencil of the street and number. The only purpose of acquiring this data was to make use of it in addressing the envelope. Had the witness testified directly that he did place the street and number upon the envelope, this testimony could not have been disputed by any one. The witness was apparently entirely candid; and mere suspicion that the street and number were not placed upon the envelope should not overcome the proper inference to be drawn from such testimony. The statute only requires that notice shall be delivered or "mailed to the owner." This is not a case where the trial court has made a finding upon conflicting evidence, but the question presented is, what is the reasonable inference to be drawn from the undisputed testimony?

Whether an envelope containing a notice, addressed without street and number thereon, would be a sufficient compliance with the statute in a city the size of Spokane need not now be determined. This record is silent as to what would be the reasonable probability of a letter in that city addressed to a person, reaching him, when the envelope did not have upon it the street and number.

The judgment will be reversed, and the cause remanded with direction to the superior court to enter a judgment in favor of the intervener.

ELLIS, CROW, and MOUNT, JJ., concur.

FULLERTON, J. (concurring).—I think an envelope addressed as this one was found to be addressed by the court was a sufficient compliance with the statute. I therefore concur in the result.

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Opinion Per CHADWICK, J.

[No. 12232. Department One. May 29, 1915.]

*In the Matter of the Adoption of NORA MAY POTTER.*¹

ADOPTION—ABANDONMENT—WRITTEN CONSENT OF PARENT. Rem. & Bal. Code, § 1696, requiring the consent of a parent to the adoption of a child by another, dispenses with such consent and substitutes that of the legal guardian where the parent has abandoned the child; but, even if consent of the parent were necessary in cases of abandonment, a writing by the mother to another, turning over "my right and title" to the child, would be sufficient evidence of consent.

ADOPTION—ABANDONMENT BY PARENT—SUFFICIENCY OF EVIDENCE. Abandonment by a mother of her illegitimate child is established by a showing that, within a few hours after its birth, she expressed her dislike for the child and her desire to get rid of it; that she gave it to a woman who offered to adopt it, and several days later gave such foster mother a writing, turning over all her right and title to her baby girl; that she never thereafter concerned herself about the child nor contributed in any way to its support; and that, on being served with notice of the adoption proceedings, she contented herself with filing an objection without taking the trouble to put in an appearance at the hearing.

ADOPTION—WELFARE OF CHILD. In matters of adoption, the dominant question is the welfare of the child and the wishes of the parent will be subordinated to that consideration.

Appeal from a judgment of the superior court for Okanogan county, Chas. A. Johnson, Esq., judge *pro tempore*, entered March 19, 1914, denying a petition for an order of adoption, upon findings of the court. Reversed.

Smith & Gresham, for appellant.

CHADWICK, J.—On the 23d day of November, 1910, one Elsie Potter gave birth to an illegitimate child. Nellie Myers, the petitioner and appellant herein, a caller at the place where the mother was staying, was informed that the mother, a girl only sixteen years old, had given birth to a child. Petitioner talked with the mother, who told her that she wanted her to "take it away and get rid of it. I don't

¹Reported in 149 Pac. 23.

want it and I don't want to see it, and get it away just as quick as you can." Appellant informed the mother that she would be willing to take the child if she would be allowed to adopt it. She was told that she might adopt it as soon as she, the mother, could "get out of town where people did not know her." Within three or four hours after its birth, appellant took the child to her own home. She then lived, and does now, about twenty-five miles from the town of Oroville, where she has been farming land belonging to her mother and brothers. Some days later, appellant returned to Oroville to get something to show a right of adoption. The mother wrote and gave her the following:

"Oroville, Washington, November 23, 1910.

"I hereby turn over my right and title of my baby girl, born November 23, 1910, to Mrs. Nellie Myers, Riverside, Wash. E. N. Potter. Witness—Edith Hayes, R. H. Hayes."

From this time on, the foster mother has been the sole support of the child. She has cared for her as her own, according to the testimony of many neighbors and residents of that county. She has given her a good home, good clothing and good food, and is sincerely attached to it.

In July, 1913, she filed a petition with the court asking for a formal order of adoption. The statutory notice was given. Upon her petition, W. E. Grant, an attorney practicing at the bar of the court in Okanogan county, was appointed the next friend of the child. A trial was had. Many witnesses were called and examined. They were closely and severely cross-examined by Mr. Grant. The proofs were abundant to show that appellant has been a true mother; that she is able to care for, support and educate the child in keeping with its station in life. The proofs show that at no time has the mother ever concerned herself about her offspring, nor has she contributed in any way or in the slightest degree to its support. Her brother, who cared for her at the time of her confinement, testified to the good character of the appel-

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lant; to her situation in life; to the condition of the little one, and expressed, in a most positive way, his belief that its interest would be best served by allowing appellant to adopt it. After the trial had been concluded, the judge *pro tempore* who tried the case directed that all papers and proceedings be served upon the mother, who had since married, but who at the time was not living with her husband. She was directed to appear at a certain time and show cause why an order of adoption should not be made. The mother did not appear as directed, but some time thereafter filed an answer or an objection. Neither the mother or the next friend made any appearance in this court. It is impossible for us to determine from the record the character of her appearance in the court below. Her answer is referred to in the brief of appellant, but we do not find it in the transcript. It is evident, however, that the court treated the objection as indicating that the mother did not intend to abandon her child; that if it appeared in a proceeding of this kind, at any stage, that a parent desired to keep the custody of his child, an order would not be made under the statute, which requires the consent of the parent in an adoption proceeding. Rem. & Bal. Code, § 1696 (P. C. 409 § 805).

It will be unnecessary to discuss the appellant's case further than to say that she has made out a case entitling her to the care and custody of the child, unless the objection filed by the mother is sufficient in itself to sustain the judgment of the lower court.

Reference to § 1696 of the code will show that the consent of a parent is not necessary where there has been an abandonment. The trial judge has fallen into error in this: He has treated the filing of the objection by the mother as a fact sufficient in itself, whereas, the question of abandonment should have been determined by reference to all of the facts in the case. When so measured, it is clear to us that the objection should not be allowed to overcome what we may

justly term the right of the foster parent and the right of the child.

Abandonment does not necessarily mean that a parent has no interest in a child's welfare. It means rather a withdrawal or neglect of parental duties. It means a withholding of care and protection, of sympathy and affection. When the subsequent conduct of the mother is considered in connection with her expressed dislike for the child and her desire that appellant get rid of it for her, and the giving of the writing which we have quoted, after sufficient time for the mother love to reassert itself, we have no hesitation in finding an abandonment. Then, again, this proceeding is instituted by the foster mother. The mother had not been interested to the slight extent of inquiring for the welfare of the child. We must presume that the situation and relation of the parties would have remained unchanged but for the fact that the mother was brought in by order of the court. It cannot be said that because a woman has given birth to a child she has a mother love for it. Mother love does not depend upon the pains and perils of childbirth. It is not every child that is welcome. On the other hand, there is an affection that grows from care and association and the tender ministrations which are prompted by a heartfelt sympathy for the weak and helpless. These beget a love as real as the love of a mother, and more, for the one who voluntarily assumes such a privilege must have far deeper maternal instincts than one who is an unwilling mother.

This court has frequently held, in considering cases of this kind, that we will make our first consideration the welfare of the child. It seems to the writer of this opinion that we would not be true to our own expressions if we were to hold that this child had not been abandoned by its parent.

In *In re Fields*, 56 Wash. 259, 105 Pac. 466, we held to the doctrine that abandonment was a question of intent; that intention was to be found at the time when a parent set in motion a set of circumstances which might and did culminate

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in a relation of foster parenthood. After reviewing the facts and law, we there said:

"We are forced to the conviction that the fact was that the intention of the appellant when she took the child to the hospital was to abandon it, in the sense of relinquishing all claims that she had upon it, so that it might be legally disposed of by the authorities of the hospital."

See, also, *Winans v. Luppig*, 47 N. J. Eq. 302, 20 Atl. 969; *Nugent v. Powell*, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. 17, 20 L. R. A. 199.

Furthermore, we are of the opinion that the writing made by the mother at the time the baby was turned over to appellant is a sufficient evidence of consent to an adoption. It will hardly be denied that, if the proceeding had been had immediately, the paper would have been sufficient, if authenticated and filed, as an exhibit in court.

"The dominant question is the moral, intellectual, and material welfare of the children. The wishes of the parent are subordinated to these considerations which, by all the courts, are deemed paramount." *Viereck v. Sullivan*, 77 Wash. 313, 137 Pac. 456.

This court gave great weight to a writing indicating the desire and purpose of a mother in *In re Wells*, 60 Wash. 518, 111 Pac. 778. In the one case the writing breathes a mother's love. In the other, a mother's indifference. Such expressions, whether the one or the other, are potent factors in controlling the discretion of a judge and satisfying him of the "fitness and propriety" of entering an order of adoption.

We hold that the mother abandoned her child at the time she gave it into the keeping of the appellant, and has since continued to abandon it; that the right of the foster mother is paramount to that of the parent, and that the interest of the child will be better served by an order of adoption.

If there were anything in the record to suggest that the objection made by the mother was well founded, or if there was any showing of conduct on her part that could be con-

strued as consistent with her present declarations, we would remand the case for a further hearing. There is not.

The judgment of the lower court will be reversed, with directions to enter an order of adoption.

MORRIS, C. J., and MOUNT, J., concur.

PARKER and HOLCOMB, JJ., concur in the result.

[No. 12237. Department Two. May 29, 1915.]

M. D. CRAWFORD *et al.*, *Respondents*, v. LOU ARMACOST *et al.*,
Appellants.¹

FRAUD—MISREPRESENTATIONS—MATTERS OF RECORD—RELIANCE. A party may rely upon a statement as to a fact made to him by another as a basis for a mutual engagement, where the facts are unknown to him but known to the other and are made for the purpose of inducing a reliance thereon, even though the statement was as to the amount of city assessments against lots, which was a matter of record, the truth or falsity of which could have been ascertained by an inspection of the public records.

FRAUD — MISREPRESENTATIONS — VENDOR AND PURCHASER. A false representation as to the estimate of the cost of a street improvement made to a prospective purchaser is a false representation as to a material fact, and not a mere expression of opinion.

FRAUD — MISREPRESENTATIONS — DAMAGES. Where one purchases property relying on the vendor's false representations that the estimated cost of an assessment thereon for a street improvement would not exceed a certain sum, and the cost was largely in excess, the purchaser would be injured to the extent of the difference between these two sums, regardless of the benefits conferred by the improvement.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered December 29, 1913, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for fraud. Affirmed.

Hovey & Hale, for appellants.

Prayn & Hoessler and *E. K. Brown*, for respondents.

¹Reported in 149 Pac. 31.

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Opinion Per FULLERTON, J.

FULLERTON, J.—In the latter part of the year 1912, the respondents, Crawford and wife, were the owners of certain farm lands situated in Benton county. At the same time the appellants, Armacost and wife, owned a half block of land in the city of Ellensburg, which contained five lots and on which there were several dwelling houses. At the time named, a proposition was made that the parties exchange properties, and after some negotiations, an exchange was made in January, 1913.

During the pendency of the negotiations leading up to the exchange, the city of Ellensburg was improving the streets in front of the lots, and it was known that the city would levy an assessment on the lots to pay the cost of the improvement. The probable amount of this assessment became a subject of inquiry on the part of the respondents when considering the terms of the exchange, and they were told by the appellants that the estimated amount of the assessment made by the city officers was \$319 a lot, or a total of \$1,595. The respondents accepted the statement as true, and made the exchange on that basis without further inquiry. Subsequently the city levied an assessment on the property of \$3,997.95, and on inquiry the respondents learned that the city's estimate of the cost of the improvement, instead of being \$319 per lot or \$1,595 for the whole, was \$800 per lot or \$4,000 for the whole. The present action was instituted by the respondents against the appellants to recover the difference between the estimated cost of the improvement as stated by the appellants and the actual cost of the same.

In their complaint the respondents alleged that the appellants well knew, at the time they made the representations as to the estimated amount of the cost of the street improvement, that such estimated cost was \$4,000 instead of \$1,595, and that they made such representation with the intent and purpose of defrauding the respondents. Issue was taken on the complaint and a trial had before a jury, which returned

a verdict in favor of the respondents for the amount claimed. This appeal is from the judgment entered on the verdict.

In this court the appellant makes but one contention, namely, that the evidence is insufficient to justify the verdict. He contends that a misrepresentation as to the estimated cost of a public improvement, although made for the purpose of cheating and defrauding another, and that other is thereby cheated and defrauded, does not furnish a basis for a cause of action; this because, first, the estimate was a matter of record, as much within the opportunity of the one party to know as it is of the other; second, because estimates are mere expressions of opinion, always held to be nonactionable, and third, because there was no injury, since the improvement enhanced the value of the property to the full amount of the assessment levied thereon.

But we cannot agree with these contentions. A party may rely upon a statement as to a fact made to him by another as a basis for a mutual engagement, where the facts are unknown to him but known to the other and are made for the purpose of inducing a reliance thereon, even though the statement is of a fact concerning a matter of public record, the truth or falsity of which could be ascertained by an inspection of the public record. *Gray v. Reeves*, 69 Wash. 374, 125 Pac. 162; *Blum v. Smith*, 66 Wash. 192, 119 Pac. 183; *McMillen v. Hillman*, 66 Wash. 27, 118 Pac. 903; *Woody v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102; *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811; *Grant v. Huschke*, 74 Wash. 257, 133 Pac. 447.

In the case of *Carpenter v. Wright*, 52 Kan. 221, 34 Pac. 798, it is said:

"The contention that no recovery can be had because the incumbrance was a matter of record is not sound. A fraudulent representation, by one who assumes to have personal knowledge, to a purchaser of real estate, that there is no incumbrance thereon, and upon which representation the purchaser relies and acts, to his injury, will sustain an action

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for the tort, although the purchaser might have discovered the fraud by searching the public records."

In the second reason given for holding the representation insufficient, counsel doubtless mean to assert that an estimate of the costs of an improvement is what the phrase usually indicates in undetermined matters, namely, a mere opinion as to the ultimate result. But in this state an estimate made by the public authorities of the cost of a street improvement is something more than this. We have held that a city making a public improvement at the expense of abutting owners could not levy an assessment in excess of the estimate required to be made at the initiation of the proceedings. *Chehalis v. Cory*, 54 Wash. 190, 102 Pac. 102, 104 Pac. 768. The representation in this case, therefore, instead of being an immaterial matter was a vital matter, since the party to whom the representation was made would thereby know the ultimate cost to which the property was liable, and could make his deal accordingly. A false representation as to the estimate was, therefore, a false representation as to a material fact, and not a mere expression of opinion.

As to the third reason, it may be true that the property was enhanced in value to the extent of any assessment that could be levied thereon for the cost of the improvement, but it by no means follows that the appellant's false representation of the cost of the improvement could not thereby injure the respondents. Clearly, if the respondents traded on the basis that the assessment on the property would not exceed \$1,595, and it actually reached \$3,997.95, they are injured to the extent of the difference between these two sums, regardless of the benefits conferred by the improvement.

The judgment is affirmed.

MORRIS, C. J., MAIN, ELLIS, and CROW, JJ., concur.

[No. 12255. Department Two. May 29, 1915.]

PACIFIC COLD STORAGE COMPANY, *Appellant*, v. PIERCE
COUNTY *et al.*, *Respondents*.¹

TAXATION—PROPERTY SUBJECT—SHIPPING—EXEMPTIONS—CONSTITUTIONAL LAW. Under Const., art. 7, § 2, providing that the legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, Rem. & Bal. Code, § 9093, is unconstitutional in so far as it exempts from taxation ships or vessels whose situs is within this state, when they are used exclusively in trade between this state and other states and territories of the United States, or foreign countries.

TAXATION—SHIPPING—SITUS OF VESSEL. The permanent situs of a vessel engaged in foreign or domestic trade, for the purposes of taxation, is fixed by the domicile of the owner, where the port of registry and home port are in the same place and the vessel has not acquired a situs elsewhere.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 9, 1914, in favor of the defendants, upon the pleadings, dismissing an action to cancel a tax. Affirmed.

A. R. Titlow and *J. A. Shackelford*, for appellant.

Lorenzo Dow, *H. G. Fitch*, and *A. B. Comfort*, for respondents.

FULLERTON, J.—The appellant, Pacific Cold Storage Company, during the year 1913, and for a number of years prior thereto owned a steamship, known as the Elihu Thompson. In the year named, the assessor of Pierce county caused the vessel to be listed on the tax rolls of that county as property of the appellant subject to taxation therein, and afterward a tax was duly levied against the vessel in the sum of \$977.40. This action was instituted by the appellant to set aside the tax so levied. Relief was denied it in the court below, and this appeal followed.

¹Reported in 149 Pac. 34.

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Opinion Per FULLERTON, J.

The appellant is a corporation organized and existing under the laws of the state of Washington, having its domicile and principal place of business at the city of Tacoma, in Pierce county. The vessel mentioned was used exclusively in trade between Tacoma and ports outside of the state of Washington; it was not used in trade between different ports within the state. The vessel was registered in the custom house at Tacoma, and the name of the port of Tacoma was painted on its stern as its port of hail or home port. While it called at the home port at more or less regular intervals, it made no protracted stays therein; merely stopping long enough to discharge the cargo it brought to the port and receive the cargo it intended to carry away. The vessel was not taxed, or attempted to be taxed, elsewhere than at the city of Tacoma, nor was there another place which could be said to be the actual situs of the vessel.

The statute (Rem. & Bal. Code, § 9093; P. C. 501 § 19), after defining what character of personal property is subject to taxation in the state of Washington, in terms broad enough to include the appellant's vessel, concludes as follows:

"Provided, that the ships or vessels registered in any custom-house of the United States within this state, which ships or vessels are used exclusively in trade between this state and any of the islands, districts, territories, states of the United States, or foreign countries, shall not be listed for the purpose of or subject to taxation in this state, such vessels not being deemed property within this state: Provided, that mortgages, notes, accounts, moneys, certificates of deposit, tax certificates, judgments, state, county, municipal and school district bonds and warrants shall not be considered as property for the purpose of this chapter, and no deduction shall hereafter be allowed on account of an indebtedness owed."

The appellant bases its claim of exemption upon the first of these provisos. Manifestly the legislature attempted to exempt from taxation vessels situated as this vessel is situated and used for the purposes for which it is used, and that the

claim of the appellant to an exemption is sound if it is within the power of the legislature to make the exemption. It is the contention of the taxing authorities of Pierce county that the legislature is without such power, and this presents the sole question to be determined upon this appeal.

It will hardly be denied, in the light of our present decisions, that the legislature cannot, under the constitutional provision requiring a uniform and equal rate of taxation on all property "in the state," lawfully exempt from taxation corporeal personal property having an intrinsic value and having a situs at some place within the state. It was so held in the case of *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. (N. S.) 707. In that case the court had before it the validity of the second proviso of the section cited. It was held that the exemption was operative as to the mortgages, notes, accounts, bonds, etc., therein mentioned, on the principle that they were not property in the stricter sense, but were properly the representatives of property, but that the exemption could not apply to moneys, because "Money in practical commercial operations possesses such value by way of immediate purchasing or exchange powers as in effect robs it of a mere representative character and clothes it with the dignity of property having intrinsic value;" and hence "to exempt it from taxation would amount to a palpable effort to avoid the taxation of all property." So, here, since the vessel in question has intrinsic value, it cannot be exempted from taxation by the legislature unless it can be said not to be property "in the state," within the meaning of that clause as used in the constitution. Const., art. 7, § 2.

In construing the meaning of this clause of the constitution, it must be remembered that it was used with reference to the taxing power of the state, that it is a term of inclusion rather than a term of exclusion, and that it was meant to secure the taxation of all property subject to taxation by the state, and not to define or mark limits within which exemption from taxation might be legal or illegal. In other

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words, when the constitution said that "all property in the state . . . shall be taxed," it meant to say that all property subject to taxation by the state shall be taxed, regardless of the question whether or not the property could be said to be technically within, or have an actual situs within, the state. That a vessel situated and used as this vessel is situated and used would be taxable as property in the state, in the absence of legislative regulation to the contrary, cannot be gainsaid or questioned. It is so held in all of the cases. While some confusion has arisen as to the proper place of taxation where the port of registry, the home port, and the domicile of the owner of the vessel are at different places, no court has as yet held that such vessels are not subject to taxation at some one of the places. So, here, since the vessel is subject to taxation by the state, we think the legislature is without power to exempt it, and we so hold.

The case of *North American Dredging Co. v. Taylor*, 56 Wash. 565, 106 Pac. 162, 29 L. R. A. (N. S.) 105, is not contrary to the view here taken. Property owned and taxable elsewhere and only temporarily in the state is not subject to taxation by the state, and the inquiry in that case was whether the dredger was permanently in the state or only temporarily so. Here no such question arises. This property is owned by a citizen of the state having its domicile within the state. The place of the owner's domicile is the registered as well as the home port of the vessel. Its permanent situs is therefore within the state, and its absence therefrom and stoppages elsewhere are but transient and temporary. Stated in another way, the domicile of the owner fixes the situs of the vessel, where it does not appear that it has acquired an actual situs elsewhere.

The judgment is affirmed.

MORRIS, C. J., MAIN, ELLIS, and CROW, JJ., concur.

[No. 12388. Department Two. May 29, 1915.]

CALHOUN, DENNY & EWING, *Respondent*, v. HANS PEDERSON
et al., *Appellants*.¹

EXCHANGE OF PROPERTY—CONTRACT—MISTAKE—EFFECT. Where by mutual mistake, a contract for the exchange of property omitted mention of a right of way to which one of the properties was subject, the court may find the intention of the parties, and allow recovery without removing the cloud on the title caused by the mistake.

SAME—CONTRACT—REPUDIATION—EFFECT. Where one of the parties to a contract for the exchange of property declares that he will not perform on his part, the other is not required to tender performance before bringing action to recover for the breach thereof.

SAME—REPUDIATION—EFFECT ON ARBITRATION AGREEMENT. Where one party to a contract for the exchange of property elects to abandon it and so notifies the other parties, the latter are released from performance on their part in the manner specified in the contract; hence an agreement in the contract that the matters in dispute should be submitted to arbitration cannot be invoked against their right of action upon the contract.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered May 21, 1914, upon findings in favor of the plaintiff, in an action upon a promissory note, tried to the court. Affirmed.

Tucker & Hyland, for appellants.

Hall & Cosgrove, for respondent.

MAIN, J.—The purpose of this action was to recover upon a promissory note. The cause was tried to the court without a jury. Findings of fact, conclusions of law, and a judgment having been entered in favor of the plaintiff, the defendants have appealed.

¹Reported in 149 Pac. 25.

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The facts necessary to an understanding of the questions presented are as follows: On January 27, 1913, the defendants and W. C. Ashley and wife, being mutually desirous of exchanging certain real estate, entered into a contract wherein the plaintiff was named as party of the first part, the Ashleys as parties of the second part, and the defendants as parties of the third part. The real estate to be exchanged by the Ashleys was a 2,860 acre farm in Adams county, Washington, commonly known as Broadacres Place. As earnest money, the Ashleys and the defendants were each to place in escrow with the plaintiff the sum of \$2,000. This deposit on the part of the defendants was in the form of a promissory note for the principal sum of \$2,000, due on demand, with interest at eight per cent per annum from demand for payment until paid. This note was signed by the defendant Hans Pederson. The contract, among other provisions, contained the following:

"It is agreed that if the title to either or both of said properties is not good, or cannot be made good within ninety days from date of completion of examination of title, the earnest money hereby receipted for shall be refunded by the party of the first part to the parties depositing the same, and this agreement shall thereupon become void.

"The question of marketability of either or both of the above properties shall be referred to an attorney to be selected by the three parties to this agreement, and the opinion of said attorney shall be accepted as final and as binding upon all parties hereto.

"But if the title to both of said properties is good and either the party of the second part or the party of the third part hereto neglects and refuses to comply with any condition of the exchange as herein set forth, within ten days of receipt of abstract for examination, then the earnest money received from such defaulting party by party of the first part herein shall be forfeited, one-half to the party not in default, and the other half to the party of the first part, and the deposit made by the party not in default shall be returned, and the party of the first part shall thereupon become released from any further obligation hereunder."

On or about March 10, 1913, the plaintiff delivered to the defendants abstract of title to the Broadacres Place. On March 14, 1913, the defendants delivered to the plaintiff their objections to the title to this real estate, among which was the fact that the abstract showed that there was a roadway and right of way for a pole line across the land. The other objections need not be noticed, since there is no controversy over them. Thereafter, on or about March 20, 1913, the defendants notified the plaintiff and the Ashleys that they would not make the exchange of the properties mentioned in the contract, even if the Ashleys should remove the objections made by the defendants within the time allowed by the contract. By the terms of the contract the Ashleys would have had ninety days from March 14, 1913, to remove the objections to the title made by the defendants. The Ashleys having, on May 12, 1913, assigned to the plaintiffs the promissory note for \$2,000, hereinbefore mentioned, this action was brought on July 1, 1913.

On the left-hand lower corner of the note was written: "This is not binding if either title is rejected." Whether this writing was placed upon the note under circumstances that would constitute fraud, as found by the trial court, need not be determined, as the rejection therein mentioned no doubt refers to a rejection in the manner specified in the contract.

It is contended that this action cannot be maintained without removing the cloud from the title caused by the right of way for pole line and road crossing the land. The trial court found that it was the intention of the parties to the contract to insert a provision in the contract providing that the title of the Ashleys to the Broadacres Place was subject to a right of way for pole line and road across the same, owned by the Washington Water Power Company, and that the Ashleys were to transfer the land to the defendants under the contract subject to this right of way, but that by mutual mistake of the parties and through the

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mistake of the scrivener in omitting the same, such a provision was not placed in the contract, and the contract was signed by the parties thereto under the mutual mistake and belief that such a provision was embodied therein.

There is another reason why the Ashleys were not required to cure the title of this defect before the action could be maintained upon the note in question, and that is that the appellants had, previous to the expiration of the time allowed under the agreement to make the title good, repudiated the contract, and had stated that the contract would not be carried out even if the objections to the title should be removed within the time provided in the agreement. Where one of the parties to a contract declares that he will not perform on his part, he thereby relieves the other from the contract and its obligations. One party is not required to tender performance when the other has made it plain that he will not accept the tender if it should be made. *Bruggemann v. Converse*, 47 Wash. 581, 92 Pac. 429; *Ferris v. Spooner*, 102 N. Y. 10, 5 N. E. 773; *Eckenrode v. Chemical Co.*, 55 Md. 51; *Roehm v. Horst*, 91 Fed. 345.

The next point made by the appellants is that this action could not properly be maintained because the question of the marketability of the Ashley property was not submitted to an attorney selected by the parties to the contract, whose opinion should be accepted as final and binding upon all of the parties, as provided in the provision of the contract above quoted. The appellant invokes the rule that where there is an agreement to submit to arbitration matters in dispute arising out of a contract, that without demanding or offering to arbitrate the matters in dispute, an action cannot be maintained upon the contract. The case of *Zindorf Construction Co. v. Western American Co.*, 27 Wash. 31, 67 Pac. 374, is cited in support of this rule. But the rule is not applicable to the facts in this case. As we have seen above, the appellants elected to abandon the contract, and so notified the Ashleys and the plaintiff, and by so doing the

Ashleys were released from further performance or tender of performance on their part in the manner specified in the contract.

The judgment is affirmed.

MORRIS, C. J., ELLIS, and CROW, JJ., concur.

[No. 12492. Department Two. May 29, 1915.]

JESSE MATHIS, *Appellant*, v. GRANGER BRICK & TILE
COMPANY, *Respondent*.¹

EXPLOSIVES—INJURIES—NEGLIGENCE—QUESTION FOR JURY. In an action by a minor child for injuries sustained from the explosion of a dynamite cap, there was sufficient evidence of defendant's negligence to go to the jury, where it appears that a partly filled box of dynamite caps was found by boys in the soil pit of defendant's brick yard, where they were used by defendant's employees and were, from time to time, left for indefinite periods, and no one in particular of the employees was held responsible by the defendant for their care and custody; it being a reasonable and natural inference that the caps were where found as a result of the work in which they were used at that place, and through the agency of the men charged with the blasting.

SAME—NEGLIGENCE—INTERVENING CAUSE—QUESTION FOR JURY. Where there is evidence sufficient for the jury as to defendant's negligence in not safeguarding dynamite caps, which came into the possession of young boys, a question as to whether such negligence was the proximate cause of the injury to another child, or whether an independent, intervening, efficient factor relieved defendant from liability, is a question for the jury, where it appears that two boys of fourteen and thirteen years of age, who found the dynamite caps, carried them around in their pockets not knowing that they could be exploded in any other way than by a fuse, until by experience they learned otherwise, and it was doubtful whether they appreciated their dangerous character; that, in running and playing on the school grounds, a cap fell from the pocket of one of the boys, and was seen and picked up by plaintiff, a child of eleven years, who, not knowing what it was, carried it several days in the pocket of his overalls without showing it to any one; that in washing the overalls, his mother removed all the trinkets from the pockets, including the

¹Reported in 149 Pac. 3.

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cap, which plaintiff took up and began picking the substance out with a hairpin, when it exploded, causing the injuries complained of.

SAME. In such a case, the act of the mother in noticing the dynamite cap in taking the things from her son's pockets was not an independent, intervening, efficient cause of plaintiff's injuries, where she testified she had never seen a dynamite cap, and laid it on one side, with the other things, "not dreaming of its being a dynamite cap."

Appeal from a judgment of the superior court for Yakima county, Kauffman, J., entered June 25, 1914, upon granting a nonsuit, dismissing an action for personal injuries sustained by a minor through the explosion of a dynamite cap. Reversed.

David Rankin, N. K. Buck, James O. Cull, and George B. Holden, for appellant.

McAulay & Meigs, for respondent.

ELLIS, J.—This is an action for personal injuries. For some years prior to the spring of 1913, the defendant owned and operated a brickyard near the town of Granger, a village of about five hundred inhabitants in Yakima county. The yard was located between the Yakima river and a range of hills, known as Snipes Mountain. The material for making bricks came from two sources; clay from the clay pit, on the side of the mountain several hundred feet from the brickyard, and soil from the soil pit, immediately adjacent to the yard and machinery. The soil pit was an excavation to a depth of about thirty feet below the level of the yard. Near the yard, were houses for employees, and the town of Granger and the nearest school building were about a half mile distant. The public highway leads south from the town of Granger, passing immediately in front of this plant and near the soil pit. To secure material from the two pits, it was necessary to loosen the earth by blasting. This was usually done with giant powder, fuse and fulminating caps, called in the record dynamite caps. The supply of explosives was usually stored

five or six hundred yards from the plant, in the hillside, in an enclosure made by placing a wooden door in front of an excavation that had formerly been used as a part of the clay pit, to which we have already referred. The door was never locked, but had a danger sign upon it. In the vicinity of the brick yard, petrified wood had been found, and children and others were accustomed to frequent the locality in search of it. Small children were frequently in and about the plant and the soil pit, which was not enclosed with fences or other barriers. There was no evidence that the respondent ever objected to their presence. There was no danger sign anywhere about the plant except on the door of the machinery building.

On about the first day of April, 1913, Eric Hilton and Ray Martin, two boys, who were then attending the public school, went over to the brickyard after school, one of them said looking for lizards in the soil pit. They found in one of the buckets of the elevator, used for hoisting soil from the pit, near the bottom, a partly filled box of dynamite caps. These they took and hid, and on the next day carried some of them to school. There was evidence tending to show that, while these two boys and the plaintiff, Jesse Mathis, then a boy about eleven years old, were running and playing together on the school ground, one of the caps fell from the pocket of either Ray Martin or Eric Hilton, probably the latter, and was picked up by the plaintiff, who said he saw it before it struck the ground. He carried this cap for a few days in a pocket of his overalls, showing it to no one. He did not know what it was. On Saturday the plaintiff's mother washed these overalls and removed the cap, with a large number of other trinkets, from the pockets, placing them on a desk in the sitting room. The plaintiff finding it there, picked it up and undertook to pick the substance out of it with a hair pin, when it exploded, mutilating the thumb and three fingers of his left hand and injuring his left ear, resulting in the loss of the fingers and thumb and a perma-

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nent impairment of his hearing. Other evidence, so far as necessary, will be discussed in considering the questions presented. At the close of the plaintiff's evidence, the court granted a nonsuit and dismissed the action. The plaintiff appeals.

If the judgment of dismissal can be soundly sustained, it must be upon one or all of three grounds, which may be stated in logical order as follows: (1) That the evidence was insufficient to establish actionable negligence on the respondent's part. (2) That the boy Eric Hilton was an independent, intelligent, intervening, efficient factor interrupting the chain of causation and relieving the respondent from liability in any event, in that its negligence was not the proximate cause of the injury. (3) That the appellant's mother was likewise an intervening cause. We shall consider these in their order.

I. The respondent contends that there was no evidence as to how the box of caps came to be in the bucket in the soil pit. Many familiar decisions are cited to the effect that verdicts based upon pure conjecture will not be permitted to stand. In applying this principle the respondent loses sight of the clear distinction between pure conjecture and reasonable inference. Negligence, like any other fact, may be proven by circumstantial evidence.

The evidence here shows that respondent had been using explosives in the soil pit and in the clay pit for a number of years. There was no evidence that any one else had used such explosives in that vicinity except on one occasion in 1911, when dynamite was employed in an effort to raise the body of a person who had been drowned in the Yakima river. Dynamite for that purpose was then secured from the respondent because it could not be procured elsewhere in the vicinity. In the consideration of the motion for a nonsuit, we must assume that the boys Eric Hilton and Ray Martin found the dynamite caps in the respondent's soil pit, the place where they say they found them. The respondent

claims that the tin box containing the caps was never taken into the soil pit, but only so many caps as were necessary to fire the blasts contemplated at a given time. The evidence shows that this was the usual course, but that it was not universal is inferable from the testimony of two witnesses who had been in respondent's employ for several years. One of these testified that he often did the blasting and handled the explosives; that he generally took sufficient caps from the clay pit to the soil pit to do the blasting, but sometimes had caps left, which were "supposed" to be returned to the clay pit. He recalled one time in particular when the box of explosives was left at the soil pit on top of the bank; that he found it there and left it there and went back to burning brick, and did not know how long it remained. The other testified that the explosives were kept "a good part of the time" in the clay pit on the hill, and sometimes down in the soil pit under certain waste timbers that were piled there; that the box containing both caps and dynamite was put under "rubbage and old boards" to keep dry; that while a passerby could not see it from above, it could be seen readily from down in the pit; that it was on a bank something like half way from the top of the pit, but could be reached easily by climbing a little way up. When asked how long he had known the caps to remain there, he answered, "Oh, I couldn't tell you. I couldn't answer that question exactly at all. Just the limits of time I don't know." The evidence was clear and ample that the explosives were habitually kept in a most careless manner in the clay pit, guarded by nothing more substantial than a wooden door which was never locked.

In view of all these circumstances, we think that when it was shown by positive evidence that these boys found the caps on the premises and in the soil pit, where they were habitually used by the respondent's employees and where they were, from time to time, left for indefinite periods, the evidence indicating that no one in particular was held responsible by the respondent for their care and custody, it was

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for the jury to say whether or not the caps were left by some of the employees of the respondent where they were found by the boys. In such a case the negligence of the employees is imputed to the master. There can hardly be reasonable doubt that the caps found belonged to the respondent. There can be no doubt that if they did, they would not have been found there had the respondent kept its explosives under lock or securely safeguarded, which was its positive non-delegable duty. There was ample evidence to take the case to the jury on the question of the respondent's negligence.

In *Crabb v. Wilkins*, 59 Wash. 302, 109 Pac. 807, a case presenting facts quite similar to this phase of the facts here, the trial court granted a nonsuit on the ground that no negligence was proved. Reversing the judgment, this court said:

"But we think that the court erred in this respect, and that there was sufficient testimony to go to the jury on that proposition, and that while there was no direct testimony concerning the manner in which these caps found their way to the place where the boys obtained them, it was a reasonable and natural inference, which the jury would be warranted in drawing from the facts proven, that they came there as a result of the work which was going on in that place and in which they were used, and through the agency of the men who were operating the drill."

See, also, *City of Victor v. Smilanich*, 54 Colo. 479, 131 Pac. 392.

II. At the time of the accident, Eric Hilton was nearly fourteen years old. Ray Martin was about a year younger. Eric knew the caps were dynamite caps, but Ray did not. Their testimony tended to show that neither of them knew, at the time they took them, that the caps could be exploded otherwise than by means of a fuse. Eric testified that at that time he had never exploded a cap and had never seen one exploded; that he "guessed" he thought they could be exploded by a fuse, but did not know that they would "go off" any other way; that he fired some with a fuse which he got at home, his father having gotten it for use in blasting

with black powder for a well; that he did not fire any of the caps in any other way; that he did not know whether Ray or any one else fired any of the caps.

Ray Martin testified that he himself exploded one cap by placing it on a rock and throwing another rock at it. This was evidently the result of an experiment such as any boy would be likely to indulge. He did not say that Eric was present at the time, but used the word "we," thus inferring that he was. He did, however, testify directly that Eric fired his caps with a fuse, and did not intimate that he ever fired any in any other way.

Another boy testified that, a day or two before the accident, he heard explosions around the school house; that he was in the school house up stairs at a window and saw Eric Hilton at the side of the school grounds put something on a rock and hit it with another, causing an explosion; that he did not see any fuse or matches used.

Whether, prior to the time when the cap which caused the injury came into plaintiff's possession, Eric Hilton knew that such caps could be exploded by any other means than by a fuse, and appreciated their dangerous character, were questions of fact to be determined from the evidence. They cannot, on this evidence, be determined by the court as a matter of law. Considering all of the evidence bearing upon the subject, it is capable of the inference that he knew that dynamite caps were dangerous, but did not know, or at least did not appreciate, the extent of their dangerous character. The evidence is capable of the reasonable inference that he did not know that they could be exploded by concussion, or in an accidental manner without the aid of a fuse.

"In common with other courts, we have held that, in passing upon a motion for a nonsuit, the court must consider, not alone the literal statements of the witnesses, but every justifiable inference favorable to the party against whom the motion is directed." *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892.

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See, also, *King v. Page Lumber Co.*, 66 Wash. 123, 119 Pac. 180; *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166; *Young v. Aloha Lumber Co.*, 63 Wash. 600, 116 Pac. 4; *Johnson v. Johnson*, ante p. 18, 147 Pac. 649.

Whether either he or Ray Martin had an appreciating sense of the extent of the danger so as to be an intelligent intervening cause was, under the evidence, a question for the jury. This phase of the case is clearly controlled by the decision of this court in *Olson v. Gill Home Inv. Co.*, 58 Wash. 151, 108 Pac. 140, 27 L. R. A. (N. S.) 884, on a state of facts strikingly analogous to that here presented. In that case the boys who stole the dynamite and caps were about fourteen years of age. The boy who was injured was younger. The court said:

"In this case it was for the jury to determine whether respondent and the other boys, considering their age, their experience, and their knowledge of right and wrong, were in their acts governed by unreasoning and natural impulses. . . . The question as to whether the boys fully understood the criminal import of their act was properly submitted to the jury and determined adversely to the appellant's contention, as was also the question of the contributory negligence of the respondent, he being of tender age. There was evidence tending to show, that the boys, including respondent, did, to a limited extent, realize that dynamite was a violent explosive. They were trying to explode it; but the evidence further shows that they did not fully understand or appreciate all of its dangerous qualities. They supposed it could only be exploded by some method of ignition, and when they lit the fuse, they dodged behind large stumps for protection. It is evident, however, that they did not anticipate that any explosion could be produced in the manner in which it was produced. In the light of respondent's tender years, his limited knowledge, his lack of experience, and all of the facts and circumstances disclosed by the evidence, we cannot hold that he was, as a matter of law, guilty of such contributory negligence as to relieve the appellants from liability, but must hold that the question of his contributory negligence was an issue for the jury."

In *Vills v. City of Cloquet*, 119 Minn. 277, 138 N. W. 33, another case closely parallel with this on the facts, the court said:

"The negligence of defendant in leaving the fuse caps where it did was not a remote cause; at least it was a question for the jury, and properly submitted to it. The cases have been so many times reviewed that we need do no more than state our conclusion, which we think is amply sustained by many decisions of this court. The principle is that where several concurring acts or conditions, one of them a wrongful act or omission, produce an injury, such wrongful act or omission is to be regarded as the proximate cause of the injury, if it be one which might reasonably have been anticipated from such act or omission, and which would not have occurred without it."

See, also, *Wellington v. Pelletier*, 173 Fed. 908; *United States Natural Gas Co. v. Hicks*, 134 Ky. 12, 119 S. W. 166, 135 Am. St. 407, 23 L. R. A. (N. S.) 249, and note thereto; *Akin v. Bradley Engineering & Machine Co.*, 48 Wash. 97, 92 Pac. 903, and note to same case 14 L. R. A. (N. S.) 586.

From these cases it is evident that courts do not and, we think, should not look too narrowly for independent intervening causes where the negligence is in the use or care of extremely dangerous agencies and the disastrous results of such negligence might reasonably be anticipated.

III. It is equally clear that the act of appellant's mother was not an independent, intervening, efficient cause. In considering the motion for a nonsuit, we must assume that she told the truth. She testified, in substance, that when she took the playthings from the boy's pocket, she noticed the cap, and at first thought it was a ferule from a pencil, but concluded it was too small; that she noticed the cap because it was bright and new and something out of the ordinary; that she had never seen a dynamite cap prior to that time, and carelessly laid it on the desk with the other things, "not dreaming of its being a dynamite cap."

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The respondent's primary negligence, which we have seen was a question for the jury, consisted in abandoning this cap in such manner that it was likely to fall into irresponsible hands, thus setting in motion a chain of causation from which might have been reasonably anticipated just such an injury as actually resulted. To say that this chain was broken, as a matter of law, by the unwitting failure of the mother to interrupt it, is to lose the logical perspective and take a distorted view of the relative importance of the incidents. It would be to eclipse the duty of one who knows of the dangerous character of an agency to control it, by magnifying the innocent failure of another to imagine a danger of which she had no knowledge, into a positive duty to know and avoid it. It would be to miss entirely the basic principle of the exercise of reasonable care, which measures the duty by the magnitude of the danger reasonably to be anticipated by one possessed of the knowledge necessary to foresee it. *Jobe v. Spokane Gas & Fuel Co.*, 73 Wash. 1, 131 Pac. 235, 48 L. R. A. (N. S.) 931; *Williams v. Spokane*, 73 Wash. 237, 131 Pac. 833; *Blair v. Spokane*, 66 Wash. 399, 119 Pac. 839; *Atherton v. Tacoma R. & Power Co.*, 30 Wash. 395, 71 Pac. 89.

The case of *Pittsburg Reduction Co. v. Horton*, 87 Ark. 576, 113 S. W. 647, 18 L. R. A. (N. S.) 905, relied upon by respondent, so far as it is sound is not in point, and so far as it is in point it seems to us unsound. It is based upon the court's argument from the evidence that the parents of the boy who found the explosive cap *knew of its dangerous character* and knew that he had it, yet permitted him to retain it for a week and finally to take it to school, where he gave it to another boy who was injured by it. This would be the sound view if the court were the trier of the facts. With deference to that court, however, we think the decision unsound in that it assumes the fact of the parent's knowledge in spite of the mother's testimony that she did not know what the cap was, and the father's testimony that he did not know

that the boy had it until he heard of it after the accident. Under our decisions, and what we conceive to be the sounder rule everywhere, their testimony made the question of their knowledge one for the jury. Under our decisions, if the court found this testimony so adverse to other conceded facts as to make it, in his opinion, unworthy of belief, he could, in his discretion, grant a new trial, but could not grant a judgment of dismissal *non obstante veredicto* without invading the province of the jury as triers of the facts. *Brown v. Walla Walla, supra*.

Every phase of this case is governed by our own decisions. The judgment of nonsuit cannot be sustained without resolving every inference from the evidence in favor of the respondent rather than in favor of the appellant, which is the converse of the correct rule.

Reversed and remanded for trial.

FULLERTON, MAIN, and CROW, JJ., concur.

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Statement of Case.

[No. 12503. Department Two. May 29, 1915.]

NELLIE S. GRAY, *Administratrix, Appellant*, v. LEOPOLD M. STERN, *Respondent*.¹

ATTORNEY AND CLIENT—PARTNERSHIP—CONTRACT FOR DISSOLUTION—ACCOUNTING—FEES. Where a contract dissolving a law partnership and arranging a division of the business on hand, and of the fees and commissions thereafter arising from such business, enumerated certain business, including among others, a specified case in which the compensation was to be a percentage of the recovery, and provided that the fees and allowances arising therefrom, except commissions on collections, shall be divided in certain proportions, must be construed as intending that in the specified case the compensation was regarded as "fees" for division, and not as "commissions" which by the contract were reserved to one of the partners as his own "fees," the element of contingency in the fee not rendering it subject to classification as a "commission."

ATTORNEY AND CLIENT—PARTNERSHIP—CONTRACT OF DISSOLUTION—PERFORMANCE. Under a contract of dissolution of partnership in the law business, wherein the retiring partner was to complete certain business in the circuit court of appeals at his own expense, in order to be entitled to an agreed share of compensation, the fact that such retiring partner was put to no further expense in the matter, and did no other work in the case, after writing the brief thereon, than make an arrangement for another attorney to argue the cause in the circuit court of appeals, would not deprive him or his estate of his share of compensation.

ATTORNEY AND CLIENT—PARTNERSHIP—CONTRACT OF DISSOLUTION—PERFORMANCE. In such a case, the fact that the brief was originally written during the existence of the partnership, would not make it the property of the continuing partner on the dissolution, so as to make its use, subsequent to the death of the retiring partner, the contribution of the continuing partner to work necessary in the cause.

ATTORNEY AND CLIENT—PARTNERSHIP—DISSOLUTION—ACCOUNTING—INDIVIDUAL PROFIT. The continuing partner who, under a dissolution contract, was to account to the retiring partner for a proportionate part of the fees on certain business, would not be required to divide the profit on buying the client's claim at a discount.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered July 11, 1914, upon grant-

¹Reported in 149 Pac. 26.

ing a nonsuit, dismissing an action for an accounting. Reversed.

Van Dyke & Thomas, for appellant.

Edward Judd, for respondent.

ELLIS, J.—This is an action for an accounting for moneys received by the defendant from certain clients of the former law firm of Gray & Stern, which moneys the plaintiff claims should be classified as “fees and allowances” under the contract dissolving that firm.

The plaintiff is the duly appointed and qualified administratrix of the estate of John G. Gray, who died intestate on May 31, 1908. On August 25, 1905, the plaintiff’s intestate, John G. Gray, and the defendant, Leopold M. Stern, formed a partnership for conducting a general law and collection business.

On September 27, 1907, this partnership, by mutual agreement in writing, was dissolved. The parts of the dissolution agreement here material read as follows:

“For and in consideration of the sum of \$1,095.20 this day paid by the said Leopold M. Stern to the said John G. Gray, the said John G. Gray bargains, sells and conveys unto the said Leopold M. Stern all his right, title, claim and interest of, in and to all business of said firm now pending or in any manner arising, except certain business hereinafter specifically itemized and set forth, it being the intent that the said Leopold M. Stern shall receive the emoluments and profits from all business now or hereafter received, except that which is expressly excluded by this contract.

“It is expressly stipulated that all mail addressed to the said firm of Gray & Stern shall be delivered by the postal authorities to the said Leopold M. Stern, and that all matters coming over the various law lists hereinafter designated as belonging to the said John G. Gray shall be delivered by the said Stern to the said Gray for attention, and the said Gray shall receive the profits therefrom for his own use and profit. That all other business arising through said mail shall belong to the said Leopold M. Stern without any claim

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of the said John G. Gray to any interest of, in and to the same.

"The said John G. Gray does hereby bargain, sell and convey to the said Leopold M. Stern all of the firm furniture, fixtures, carpets, stationery and other utensils acquired during the existence of said copartnership, together with all indebtedness whether evidenced by book accounts or notes, and all fees earned and to be earned in the business of said copartnership, and does hereby sell, assign, transfer and set over all his interest in that certain lease to Rooms 701 to 705 inclusive, Lowman Building, Seattle, Washington, together with all moneys on deposit in the Puget Sound National Bank to the credit of said firm, it being the intent of this instrument that all of the assets of said firm whether represented by cash, bank deposit, book accounts or indebtedness shall become the property of the said Leopold M. Stern.

"It is hereby agreed that the said John G. Gray shall at his own expense complete the following unfinished business: The Puget Sound Engine Works case, now in the Circuit Court of Appeals.

"Certain bankruptcy matters as follows: Frank Subarber; O. E. Hyggen; Lynden Mercantile Co.; H. Cohl; D. Offutt & Co.; L. Verstandig & Jacobs; Thurber.

"Certain receivership matters as follows: Central Alaska Co.; Holden Furniture Co.; Alki Point Transportation Co.

"Certain other litigation as follows: Van Schuyver & Co. v. Macauley; Adair v. Cymru Copper Co.; Sarah Kinder matter.

"That the said Leopold M. Stern shall be reimbursed for all costs advanced by the copartnership in all matters and the said John G. Gray shall be reimbursed for any cash disbursements made by him on account of said matters hereinafter. That the fees and allowances arising therefrom, except commissions on collections, shall be divided in manner as follows: Leopold M. Stern, two-thirds; John G. Gray, one-third.

"The following litigated matters designated as the McCarthy Dry Goods Co. matter and the Wilson Bros. v. Alaska Mercantile Co. matter are to be handled by the said John G. Gray and the said Leopold M. Stern jointly, and whatever revenue or fees arising therefrom, except commissions on

claims of creditors, shall be divided as follows: Leopold M. Stern, two-thirds; John G. Gray, one-third.

"Provided that if the claim of Mills & Gibb as creditors can be charged with any fee the said John G. Gray shall have his one-third thereof and the said Leopold M. Stern his two-thirds.

"That in the bankruptcy and receivership matters handled by the said John G. Gray and in the matters handled jointly by the said John G. Gray and the said Leopold M. Stern, the proceeds of all collections on claims of creditors shall be delivered to the said Leopold M. Stern for remittance, with right to him to charge such fees as he may deem proper in premises and to keep and retain said fees as his own."

In the complaint it is averred, in substance, that the firm of Gray & Stern represented about fourteen claimants in the litigation designated in the agreement as the Puget Sound Engine Works case; that, as the plaintiff is informed and believes, her intestate performed all services necessary to be performed in that case prior to his death; that the defendant has collected, as fees and allowances in that case, a large sum of money, for which he refuses to account.

The defendant, by answer, admits that the firm of Gray & Stern represented about fourteen claimants in the Puget Sound Engine Works case, and denies the other averments above mentioned. The answer also sets out certain matters as affirmative defenses which are traversed by the reply. With these we are not here concerned.

The Puget Sound Engine Works case involved the prosecution against a surety company, as surety upon the contractor's bond, of a large number of claims for material and labor furnished to the contractor for the construction of a Federal public work. Fifteen of these claims were represented by the firm of Gray & Stern. The others were represented, respectively, by several different attorneys and legal firms. The cause was tried in the lower Federal court and all of these claims were allowed. The surety company appealed to the United States circuit court of appeals for the ninth

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circuit. The decedent, Gray, wrote the brief on behalf of the claims represented by Gray & Stern in the court of appeals prior to the dissolution of the partnership. It seems to be conceded that this brief presented the whole case of all the claimants and was adopted by those represented by other attorneys. By agreement between Gray and the other attorneys, the case was argued in the circuit court of appeals by H. T. Granger, the attorney who represented the largest of all the claims. The cause was argued in the circuit court of appeals in the spring of 1908, after the dissolution of the partnership of Gray & Stern, but before Gray's death. The decision of the lower court was affirmed by the court of appeals about ten days after Gray's death. The surety company appealed the case to the supreme court of the United States. Granger, by tacit consent of all the attorneys representing the claimants, took charge of the case in the supreme court, using a reprint of the brief prepared by Gray for the court of appeals, with only such formal changes as were necessitated by the difference in forum. Granger testified that he attended to this reprinting, the filing of the brief in the supreme court, sent the briefs himself, and conducted all of the correspondence with the clerk of the supreme court necessary to a submission of the case, which was presented on briefs without argument; that he received no assistance from Stern in connection with the case, except that when he, Granger, assessed all of the claimants in proportion to their claims to pay the expenses, Stern sent him the proportion assessed to the claimants originally represented by Gray & Stern. The decision of the court of appeals was finally affirmed by the supreme court. Stern, who was called as a witness for the plaintiff, testified that all of these claimants save one paid these assessments. That one claimant, Meacham & Pinard, while the case was pending in the United States supreme court, sold its claim at a discount to Stern, who, on the affirmation of the judgments in favor of the claimants by the supreme court, realized a profit of \$260 on this claim.

Stern further testified that all of the claims were originally taken by the firm of Gray & Stern on a contingent "commission" of ten per cent of the amount collected, but that when the matter was wound up he made an effort to get a larger "commission" because of the time and labor involved and that some of the claimants allowed as much as twenty per cent, some fifteen per cent, and others stuck for the original percentage of ten; that he finally collected and retained as compensation specific amounts on each of these claims, which amounts aggregate \$1,218.76. This includes the \$260 profit made on his personal purchase of the Meacham & Pinard claim.

At the close of the plaintiff's evidence, the defendant moved for a dismissal on the ground that the evidence was insufficient to sustain a judgment against the defendant. The motion was granted. From the judgment of dismissal and for costs, the plaintiff appeals.

Two questions are presented: (1) Under the contract of dissolution, should the compensation collected by the respondent in the Puget Sound Engine Works case be treated as "fees and allowances" and therefore subject to a division, two-thirds to respondent and one-third to the appellant, or as "commissions on collections" in which the appellant would have no interest? (2) Assuming the former, did the plaintiff's intestate perform his part of the contract of dissolution so as to entitle his estate to one-third of this compensation?

I. The first question must be solved by a construction of the contract in the light of its terms and subject-matter. We do not regard the contract as ambiguous. Taking the literal and usual meaning of the words "fees" and "commissions," it seems to us that the compensation of the attorneys for conducting litigation through several courts, as was the case in the Puget Sound Engine Works litigation, falls under the former rather than the latter. It is admitted that the compensation was to be determined by a percentage of the amount

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recovered and was contingent on the recovery. A "contingent fee" is defined in Black's Law Dictionary as follows:

"A fee stipulated to be paid to an attorney for his services in conducting a suit or other forensic proceeding only in case he wins it; it may be a percentage of the amount recovered."

A more exact definition or description of the compensation received in the litigation here in question could hardly be framed. The same work defines the word "commission," as used in commercial law, as follows:

"The recompense or reward of an agent, factor, broker, or bailee, when the same is calculated as a percentage on the amount of his transactions or on the profit to the principal. But in this sense the word occurs more frequently in the plural."

It requires a most strained construction to fit this definition to the case here. Even regarding the attorney as the legal agent of the client, as in a sense he is, in the mere collection of accounts or claims due to the client, the compensation for such collection could hardly be classed as "commissions" under this definition, where the collection was only made after long and tedious litigation in the courts, not only to secure the money, but also to establish the claims. This is especially true since the dissolution contract clearly covers business of both kinds, that is, mere collections and contested litigation, and the words "commissions on collections," reasonably though loosely applicable to compensation for the one, and the word "fees," strictly and commonly applicable to compensation for the other, are both used in the contract.

There is nothing in the connection in which these words are used to indicate that they are to have any other than their usual and ordinary meaning as applied to the Puget Sound Engine Works case. On the contrary, that case seems to be intentionally excluded from the enumeration of matters to which the term commissions is applied. The contract first states that fees and allowances, arising from the Engine Works case, certain specified "receivership matters," and cer-

tain specified "other litigation," except commissions on collections, shall be divided, two-thirds to Stern, one-third to Gray. Then follows a provision touching two litigated matters, not included in those above specified, nor either of them the Engine Works case, in which two matters all revenue or fees, "except commissions on claims of creditors," shall be divided in the same way, and a further provision that in the bankruptcy and receivership matters, proceeds of all collections on claims of creditors shall be delivered to Stern for remittance, with the right to him to charge such "fees" as he may deem proper and keep and retain such "fees" as his own. Since the Puget Sound Engine Works case is not included in the two litigated matters last referred to, and since it was not a bankruptcy matter, but a suit on a bond, it is clear that the parties have, by the process of exclusion, designated all compensation in that case as "fees and allowances" to be divided one-third to Gray, two-thirds to Stern. The contract, taken as a whole, is capable of no other construction.

II. The contract provides that Gray, the intestate, should, at his own expense, complete the following unfinished business: "The Puget Sound Engine Works case now in the circuit court of appeals," and certain other matters not here material. So far as the record now shows, he had, prior to his death, completed all the arrangements which, as the result proved, were necessary to a successful completion of that case. He made the arrangement with Granger to argue the case in the court of appeals, and the brief which he wrote was by Granger, not Stern, modified to fit the new forum and reprinted for use in the supreme court of the United States. There is no merit in the argument that because this brief was originally written during the existence of the partnership, it became Stern's property on the dissolution, and its use was his contribution to the work necessary after Gray's death. Had Gray lived and done exactly what Granger did, no one could have claimed that he had not done all that was necessary to complete the case. There was no other work

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to be done in the matter and there were no expenses to be paid except such as were paid, and in any event would have been paid by the claimants. The fact that Gray personally did nothing in the matter after writing the brief and arranging with Granger to argue the case, and by reason of that arrangement would have been at no further expense in the matter, is hardly a reason why his estate should be deprived of his agreed share of the compensation. Nor does the fact that the brief was written and these arrangements made prior to the dissolution of the partnership alter the case. Both parties must be presumed to have known that there might be or might not be other work to be performed and other expenses to be paid. Since neither additional work nor expense was required, we can see neither reason nor justice in allowing the respondent to reap all of the benefit from a condition to which he did not contribute.

One other thing remains to be noted. The respondent in any event should not be required to account for more than a ten per cent fee on the amount recovered in the claim of Meacham & Pinard. The judgment on that claim was \$606.43. The respondent bought the claim at a discount after the dissolution of the partnership. The speculation was a personal one. He is entitled to the profits but he took the claim subject to the agreement in the dissolution contract to account for the fee. The entire revenue derived from the other claims should be regarded as fees and allowances under the contract. We are clear that the evidence was sufficient to put the respondent to his defenses, and that the challenge to the appellant's evidence was improperly sustained.

Reversed and remanded for trial.

MORRIS, C. J., FULLERTON, MAIN, and CROW, JJ., concur.

[No. 12541. Department One. May 29, 1915.]

WILLETT & OLESON, *Respondents*, v. J. F. JANECKE,
Appellant.¹

RECEIVERS—ATTORNEY'S FEES—PERSONAL LIABILITY. A receiver of an insolvent corporation is not personally liable to attorneys for any deficiency in the allowance by the court of their claim for compensation, where, under the orders of the court, he employed attorneys to serve him in his trust capacity, and in good faith endeavored to procure a proper allowance for them, in which effort the attorneys participated, and paid over to such attorneys the entire amount allowed by the court.

Appeal from a judgment of the superior court for King county, Humphries, J., entered November 14, 1914, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Reversed.

Geo. B. Cole and *John Wesley Dolby*, for appellant.

Edward Judd, for respondents.

PARKER, J.—The plaintiffs, copartners engaged in the practice of law in Seattle, commenced this action in the superior court for King county, seeking recovery of compensation for legal services rendered by them to the defendant as receiver for the Angeles Brewing & Malting Company, an insolvent corporation. Trial before the court without a jury resulted in findings and judgment against the defendant personally, from which he has appealed to this court.

The undisputed facts, which we regard as determinative of the rights of the parties, may be summarized as follows: In April, 1910, appellant was, by the superior court for Clallam county, appointed receiver for the Angeles Brewing & Malting Company, a corporation with its principal place of business in that county. The corporation was then insolvent, and appellant was appointed receiver and took charge of the property and affairs of the corporation and continued

¹Reported in 149 Pac. 17.

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to act as receiver until July, 1914, when he was succeeded by another receiver. Soon after appellant's appointment as receiver, an order was made by the superior court for Clallam county in the receivership proceedings, authorizing and directing him to employ counsel to advise him touching his duties as receiver and to represent him in litigation in which he as receiver might become a party. Appellant thereupon employed respondents for that purpose.

There is nothing in the record pointing to any employment of the respondents by appellant to advise him or to represent him or his interests other than in his official capacity as receiver, nor is there anything in the record indicating that appellant agreed to become personally liable to the respondents for their compensation. Manifestly, respondents fully understood that this was the nature of their employment. Thereafter respondents entered upon their employment and continued to render services to the appellant in the interest of the receivership, but not otherwise, while he continued to act as receiver. Respondents claim that their services so rendered were of the reasonable value of \$15,000, and that they also disbursed in expenses incident to their services \$629.55. Appellant has paid respondents \$5,670.50, which, according to respondents' claim, would leave a balance of \$9,959.05, for which judgment was rendered in this action in their favor against appellant personally. There occurred upon the settlement of the appellant's account as receiver in the superior court of Clallam county, according to the testimony of one of the respondents, as set forth in the abstract, the following:

"The attorneys for the receiver (respondents) prepared a final report covering all of the doings of the receiver from his appointment to July 23, 1913. This final report was heard on September 29th and 30th, 1913. All vouchers, books of account and records of every kind were taken to the court and the matter was thoroughly investigated. The court asked for further information as to certain items. This was furnished in the nature of a supplemental report and argument.

"The court did not pass on the report at that time, but ordered a supplemental report to be filed covering the period from July 23, 1913, to March 1, 1914. This the attorneys prepared and filed. At the hearing on the report of July 23, 1913, evidence had been introduced that \$15,000 was reasonable compensation to be allowed for the legal services rendered. The supplemental report of March 1, 1914, contained a statement that the attorneys for the receiver had submitted to the receiver a bill for \$15,000 which the receiver reported was reasonable and asked for an allowance of that amount. A copy of that report was served on each attorney who had appeared in the case, together with a notice of the time and place of hearing the report, and a notice to serve and file any objections or exceptions. No objections or exceptions of any kind were filed. The creditors were represented at the hearing by two attorneys who attacked the report in other particulars, but did not object in any way to an allowance of the \$15,000 fee claimed. Two additional expert witnesses testified at that hearing that \$15,000 was reasonable compensation for the legal services rendered.

"There were certain negotiations affecting the form of the order to be entered on the final reports, and thereafter, on May 5, 1914, the court signed and entered an order as drawn by the plaintiffs in this case, with certain immaterial exceptions. Plaintiffs then resigned as attorneys about May 10, 1914. The judge having charge of the receivership made allowances to the receiver of \$4,750 on account of legal services, but has made no further allowances."

We quote this testimony to show that appellant has in good faith endeavored to procure from the court in the receivership proceedings an allowance of attorney's fees in the full amount claimed by respondents, and also to show that respondents participated in the efforts of appellant to procure the allowance of attorney's fees claimed by them.

Counsel for appellant contend that he is not personally liable to respondents for their services rendered to him as receiver. We are of the opinion that this contention must be sustained in the light of the facts we have noticed. Counsel for respondents invoke the general rule that an allowance of attorney's fees in cases of this nature is properly made to the

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receiver and not directly to the attorneys, and that the attorneys must look to the receiver for their compensation; citing 34 Cyc. 465, and other authorities. This is the general rule applicable to an allowance of attorney's fees made upon the settlement of a receiver's account. But it does not follow that attorneys employed by a receiver in pursuance of an authorization made by the court for attorney's services solely in relation to the receivership, may hold the receiver personally liable, when the receiver has in good faith endeavored to procure a proper allowance of attorney's fees by the court and has paid over to such attorneys the entire amount allowed by the court; especially where the attorneys, as here, have participated with the receiver in his efforts to procure the allowance claimed. In the text of 23 Am. & Eng. Ency. Law (2d ed.), 1098, we read:

"A receiver is, of course, liable upon any valid and authorized contract made in the course of his duties. The liability of a receiver upon contracts entered into in his official capacity is not, however, personal, but as a representative of the trust. The enforcement of such contracts, or the payment of damages for their non-performance, must fall primarily upon the property and fund in the hands of the court."

We are quite unable to understand why this rule is not applicable here. Respondents' contract of employment with the receiver manifestly contemplated services to be rendered by them only in the interest of the trust. Their right to compensation was, we think, of the same nature as that of any other contractual obligation incurred by the receiver as such, and did not result in a primary personal liability on the part of the receiver. Of course, the receiver might render himself personally liable by special contract, or by failure to act in good faith looking to the payment out of the trust property of an obligation he incurs as receiver, but we have no such case here. In *Vanderbilt v. Central R. Co.*, 43 N. J. Eq. 669, 12 Atl. 188, considering the nature of the liability incurred by

the receiver by his contracts made as such, Justice Magie, speaking for the court, observed:

"When a receiver has thus acquired discretionary powers to operate an insolvent railroad, his position is peculiar, and the contracts he makes for that purpose are *sui generis*.

"Such a receiver is not exempt from liability to answer for the injuries inflicted by the wrong doing or negligence of those he employs in operating the railroad. Yet the liability is not a personal one, but only falls on the receiver as the representative of the property and fund managed by the court, and damages recovered for such injuries are to be thus collected. Yet upon such liability no suit can be brought except by leave of the court which appointed the receiver. Such leave, however, cannot be denied, unless the claim appears manifestly unfounded and vexatious. *Palys v. Jewett*, 5 Stew. Eq. 302; *Little v. Dusenberry*, 17 Vr. 614.

"Analogous principles should be applied to those acts of a receiver which constitute contracts with third persons in the operation of an insolvent railroad in his charge.

"The liability of a receiver upon such contracts is not personal, but as a representative of the trust. The enforcement of them, or the payment of damages for his non-performance of them, must fall primarily upon the property and fund in the hands of the court."

In *Walsh v. Raymond*, 58 Conn. 251, 20 Atl. 464, 18 Am. St. 264, there was involved an attempt on the part of counsel who had rendered legal services for a receiver to hold the receiver personally liable for compensation therefor under circumstances quite similar to those here involved. In holding that the receiver could not be so held, Justice Hall, speaking for the court, said:

"A receiver is uniformly regarded as an officer of the court. He is the servant to whom the court entrusts the property *in custodia legis*, of which the court itself is the guardian. He is regarded as the executive officer of a court of chancery, in much the same sense as the sheriff is the executive officer of a court of law, and the goods or property in his hands are as much in the custody of the law as if levied upon under an execution or attachment: *High on Receivers*, § 2. Baldwin, J., in giving the opinion of the court in *Beverly v. Burks*, 4

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Grat. 208, says:—"The receiver is the officer and representative of the court, subject to its orders, accountable in such manner and to such persons as the court may direct, and having in his character as receiver no personal interest but that arising out of his responsibility for the correct and faithful discharge of his duties. It is of no consequence to him how, or where, or to whom, the court may dispose of the funds in his hands, provided the order or decree of the court furnishes to him a sufficient protection."

"It is evident that a receiver must, in the absence of statutory authority, derive his powers largely from the established practice of courts of equity, and in this respect as well as his relations to the court appointing him and the consequent restriction upon his powers, a receiver occupies a somewhat different position from that of an executor or administrator. Strictly, a receiver has no right to incur any liability or in any way hazard the fund in his custody without the consent of the court. . . .

"We cannot conceive that any attorney at law, whose every act must be with full knowledge that he is acting for an officer of the court, will complain that in accepting employment for a receiver he is held to do so with the understanding that his compensation will depend upon the amount that may be allowed him therefor by the court upon the final accounting of the receiver. Any other rule would subject the receiver to expensive litigation after his final accounting and discharge from his trust by the court. We do not mean, however, to be understood as holding that a receiver, while acting as such, cannot make himself personally liable upon his contracts or otherwise, but simply that he will be protected so long as he acts strictly under the orders of the court appointing him."

Counsel for respondent call our attention to, and rely upon, observations made by this court in *In re Sullivan's Estate*, 36 Wash. 217, 78 Pac. 945, as follows:

"The allowance for attorney's fees is not made to the attorney, but to the administrator, as a necessary expenditure incidental to his settlement of the estate. There is no relation between the administrator's attorney and the estate, and he can assert no claim against the estate for his services, but the administrator is himself liable in a suit by the attorney."

These remarks were made in connection with the administration of an estate of a decedent where there was involved nothing but the right of the administrator to an allowance as against the estate. The question of whether the attorney could recover from the administrator more than the amount allowed by the court in the settlement of his account was not there involved. The above quotation from *Walsh v. Raymond*, pointing out the difference between the powers of administrators and receivers, we think is, in any event, sufficient to show that the remarks of the court in *In re Sullivan's Estate* would not be controlling here.

We conclude that, under the facts disclosed by this record, the respondents have no right of recovery whatever against appellant personally. The judgment of the trial court is reversed.

MORRIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

[No. 12614. Department One. May 29, 1915.]

NATIONAL LUMBER & BOX COMPANY, *Respondent*, v. TITLE
GUARANTY & SURETY COMPANY, *Appellant*.¹

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—CONTRACTS—BOND OF CONTRACTOR—LIABILITY—SUPPLIES. A bond given by a contractor to secure payment of laborers and materialmen upon public work and all persons who shall furnish the contractor with "provisions and supplies" for the carrying on of said work, in compliance with Rem. & Bal. Code, § 1159, covers sums due for the rental of a donkey engine furnished to the contractor on city street improvement work.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered June 24, 1914, upon findings in favor of the plaintiff, in an action upon indemnity bonds, tried to the court. Affirmed.

¹Reported in 149 Pac. 16.

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Opinion Per PARKER, J.

Frank Beam, for appellant.*Bridges & Bruener*, for respondent.

PARKER, J.—The plaintiff, National Lumber & Box Company, seeks recovery upon three street improvement contract bonds executed by William Dutcher, as principal, and the defendant, Title Guaranty & Surety Company, as surety. Trial before the court without a jury resulted in findings and judgment in favor of the plaintiff in the sum of \$375, from which the defendant has appealed.

The bonds sued upon were given to secure the performance by Dutcher, as contractor, of three street improvement contracts for the city of Aberdeen, and also to secure payment by him to all persons furnishing him with provisions and supplies for the carrying on of the contracts. The bonds were executed in compliance with Rem. & Bal. Code, § 1159 (P. C. 309 § 93), relating to contracts for public improvements. The contracts and bonds were executed in the fall of 1910, and thereafter the work under the contracts was prosecuted by Dutcher up until May, 1911, when he became insolvent and unable to proceed further in the performance of the contracts. On June 3, 1911, respondent presented to the city council of the city of Aberdeen a notice of claim for the rental of a donkey engine which it had furnished to Dutcher for use in the performance of the contracts. This notice was presented with a view of complying with Rem. & Bal. Code, § 1161 (P. C. 309 § 97), as a condition precedent to its right to sue upon the bonds. Respondent's claim, as evidenced by the notice, was for rent of the engine for six months, at a monthly rental of \$75 per month, which was claimed as the agreed rental and the period of time the engine was used by Dutcher upon the work of the contracts.

Counsel for appellant contends that the trial court erred in overruling its demurrer to respondent's complaint. The only argument advanced in this behalf is that the rental of a

donkey engine used as this one was is not included within the terms "provisions and supplies" as used in Rem. & Bal. Code, § 1159 (P. C. 309 § 93), and is therefore not a secured item under the terms of a bond given in accordance with that section. This question has been disposed of adverse to counsel's contention by our decision in *Hurley-Mason Co. v. American Bonding Co.*, 79 Wash. 564, 140 Pac. 575, where we held that the rental of a pump and hoisting derrick furnished to a contractor to be used, and actually used, in the erection of a city bridge was secured by a bond given in compliance with this law. It seems plain to us that there is no difference in principle between the securing of rental for such an appliance and the securing of rental for a donkey engine used upon public work as this one was. Counsel's argument seems to be directed largely to an effort to secure the overruling of that decision. We are, however, satisfied with the conclusion there reached, and think the question does not require further discussion.

Counsel strenuously argues that the evidence does not support the conclusion reached by the trial court, especially in that the judgment is excessive. We deem it sufficient to say that we have carefully read all of the evidence as found in the statement of facts, and are unable to say that the evidence does not preponderate in favor of the conclusion reached by the trial court.

Other claimed errors relate to rulings of the trial court upon motions of appellant directed to respondent's complaint. These are presented to us practically without argument and wholly without citation of authorities. There may have been technical error in the rulings complained of, but in view of the whole record, we think they were in any event without prejudice to appellant's rights.

The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ.,
concur.

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Opinion Per Curiam.

[No. 12757. Department Two. May 29, 1915.]

THE STATE OF WASHINGTON, *on the Relation of M. A. Hannebohl et al., Plaintiff*, v. THE SUPERIOR COURT FOR PACIFIC COUNTY, *Edward H. Wright, Judge*,
*Respondent.*¹

VENUE—CHANGE—PREJUDICE OF JUDGE—MOTION — JURISDICTION OF COURT. Under 3 Rem. & Bal. Code, § 209-2, authorizing change of judge for prejudice, the filing of a motion for change of judge, accompanied by an affidavit of prejudice, divests the lower court of jurisdiction to further proceed in the action, although made in connection with defendant's first appearance in the action.

APPEARANCE—DEMURRER OPERATING AS. Where a defendant files a demurrer after the time for appearance has expired, but before any rule has been entered against him, the filing of the demurrer constitutes an appearance, and hence leave of court therefor would be unnecessary.

Application filed in the supreme court April 9, 1915, for a writ of mandamus to the superior court for Pacific county, Edward H. Wright, J., for a change of judges. Granted.

Fred M. Bond, for relators.

Paul Holbrook, for respondent.

PER CURIAM.—Relators sued out an alternative writ of mandate addressed to respondent upon his refusal to grant relators' motion for change of judge. Relators were served in the action below on March 2d and 4th respectively. On April 1st, they appeared by filing a demurrer, at the same time filing a motion for change of judge, accompanied by the usual affidavit of prejudice. On April 5th, counsel for plaintiff below moved for relators' default, and at the same time called up for hearing relators' motion for change of judge. Upon this hearing respondent held that relators had no standing in court, as they had appeared without having obtained leave of court. Relators' demurrer and motion were

¹Reported in 149 Pac. 16.

stricken and plaintiff's motion for default granted. Upon these facts the writ must be granted. The filing of the motion for change of judge, accompanied by the affidavit of prejudice, divested the lower court of jurisdiction to further proceed in the action. *State ex rel. Russell v. Superior Court*, 77 Wash. 631, 138 Pac. 291, and cases cited.

There is no merit in the contention that relators were in default, or that their demurrer was properly stricken because of their failure to obtain leave of court before appearing in the action. Although the time for appearance had expired, no rule had been entered against relators, and they were not in default, nor was it necessary for them to obtain leave of court before entering their appearance in the action. The filing of the demurrer was such an appearance. The filing of the motion for change of judge, being made in connection with the relators' first appearance in the action, was a full compliance with the statute. 3 Rem. & Bal. Code, § 209-2. Much is said by counsel for respondent as to the abuse of this statute. Conceding that fact, it does not eliminate the mandatory features of the statute and the necessity for a full compliance with its terms. The fault must be corrected by the legislature and not by the courts.

We find no merit in the objections to the issuance of the writ, and the same will issue.

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Syllabus.

[No. 12583. Department One. June 3, 1915.]

**JESSE THOMAS, *Respondent*, v. THE KNIGHTS OF THE
MACCABEES OF THE WORLD, *Appellant*.¹**

INSURANCE—MUTUAL BENEFIT INSURANCE—RIGHT OF CERTIFICATE HOLDER. A certificate of membership in a fraternal beneficiary society assuring the payment of a benefit on the death of a member is not a contract in the commercial sense, but a mutual promise of every member to pay the certificate of every other member; hence there is no vested right in any provision of the contract, either express or implied, that is not subject to and controlled by the duty of the member to pay the cost of his own insurance, for under no construction of a mutual contract can he demand more than he is willing to give.

SAME—MUTUAL BENEFIT INSURANCE—RIGHT OF CERTIFICATE HOLDER. An agreement made by a member of a fraternal beneficiary society, when accepting his certificate, to abide by all the laws, rules and regulations of the society that may have been or might thereafter be passed, binds him to observe such legislation as is calculated to insure a rate sufficiently adequate to pay the cost of his own insurance; hence the action of the society in raising the assessment rate subsequent to the issuance of his benefit certificate based on a lesser rate, on a finding of necessity therefor by the legislative authorities of the society, cannot be objected to by the member as a violation of his contract.

SAME—INCREASE OF RATES—ESTOPPEL. The issuance and acceptance of a benefit certificate in a mutual fraternal society not being in the strict sense a contract, the doctrine of estoppel cannot be invoked against the society's increasing its assessment rates, by reason of the complaining party having been lured into joining by the provisions of its by-law fixing rates, the speeches of supreme officers, or other matters in the nature of estoppel.

SAME—CONTRACTS—VESTED RIGHTS. There is no vested right in having a benefit certificate of a mutual fraternal society remain unchanged, for the reason that there can be no vested right in such contract so long as a duty to the other contracting parties rests upon the one asserting it and his duty is unperformed; hence, a member of a mutual insurance society has no right to insist that it continue to do business upon an unsound basis for his individual benefit.

¹Reported in 149 Pac. 7.

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SAME—INCREASE OF ASSESSMENTS. Where the old plan of assessment for a mutual insurance society proves a failure, and a readjustment of the rates charged is necessary so as to make the basis therefor conform to the cost of insurance according to the age of members, the fact that the burden of meeting the alleged deficiency in rates is cast upon those who have attained the age of fifty years or more, while the increase was not made applicable to the younger class of members, is not the fixing of an arbitrary age and producing a class distinction, since it is made in conformity to the law of experience in such matters.

SAME—DEPRIVATION OF MEMBERSHIP—INCREASE OF RATES. The fact that a member of a fraternal beneficiary society will be turned out and thus lose all fraternal features of the society is no ground for defeating an increase in the rate of assessment, when that is found necessary to the continued life of the institution.

SAME—AMENDMENT OF BY-LAWS. The fact that the rate of assessment on members of a mutual insurance society was fixed in a by-law at the time he entered the society, would not preclude the society from subsequently changing that, as well as any other, by-law, when the power of amendment is reserved as to all by-laws, and a condition attached to the issuance of the benefit certificate was a compliance with the laws in force or thereafter adopted.

SAME—RIGHT OF CERTIFICATE HOLDER. Where a member of a fraternal beneficiary society agreed, in accepting a benefit certificate, that the society might levy any number of assessments necessary to pay death losses, the imposition of increased rates distributing such payments over a number of years, instead of making more frequent assessments, cannot be regarded as a violation of a contract limiting his assessments to the rate fixed at the time of entering the society.

SAME—SURPLUS. The fact that there is money in the treasury of a mutual insurance society to be devoted to the payment of death benefits is not always a surplus or reserve nor does it necessarily show the lack of necessity for an increase in assessment rates, when in fact such sum is inadequate to meet payment of the death claims to which the society is actually pledged.

SAME—RESCISSION OF CONTRACT. A member of a fraternal beneficiary society whose assessment rate has been increased for the purpose of enabling the society to adequately perform its functions cannot rescind his contract and recover the dues and assessments paid by him; since the society has not thereby repudiated the contract, but is endeavoring to perform it, and he cannot complain so long as he has had protection for less than cost.

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Opinion Per CHADWICK, J.

SAME—INCREASE OF ASSESSMENTS. The increased rate for assessments affected by a fraternal benefit society being in conformity to the mortuary tables established by the National Fraternal Congress, as is required by the laws of this state, which become a part of every contract of insurance written herein, a member cannot complain of such action, though burdensome to him individually.

COSTS—APPEAL—AWARD TO UNSUCCESSFUL PARTY. The allowance of costs in a suit in equity being a matter within the discretion of the court, on reversing an appeal, it is proper to award costs against the appellant, where the case is a test one and has an importance to the appellant aside from the reversal of the case at issue, as it affects every member of it.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 4, 1914, upon findings in favor of the plaintiff, in an action to enjoin the collection of an assessment levied by a fraternal benefit association, tried to the court. Reversed.

Reynolds, Ballinger & Hutson and Carlos S. Hardy, for appellant.

Jesse Thomas, in propria persona.

George W. Miller, amicus curiae.

CHADWICK, J.—Jesse Thomas, respondent, then thirty-eight years old, applied for and received a certificate of membership in the appellant order, a fraternal beneficiary association organized under the laws of the state of Michigan. The society was organized, and commenced to do business as such, in the year 1883. It is what is popularly known as a fraternal benefit association, having no other object than to promote social and fraternal intercourse among its members and to pay benefits in case of sickness or death. It is carried on by a lodge system having a secret ritual. It adopted and has maintained a representative form of government. Its subordinate or local bodies are called "Tents." A state body, known as the "Great Camp," is made up of delegates elected by the "Tents." The Great Camp in turn elects delegates to a national council or assembly known as "The Su-

preme Tent." Each of these bodies have legislative powers, the Supreme Tent having a general revisory power over the acts of all subordinate bodies, as well as jurisdiction to make all changes in the substantive law of the order which in its judgment may be necessary for its preservation and well being. At the time it was organized, the society adopted a schedule of rates to be collected by assessment upon the membership, the fundamental thought being that the society would make an assessment upon the membership to meet each death loss as it occurred, and *"in case one assessment per month shall not be sufficient to pay the death and disability claims as they occur, then the supreme record keeper is hereby authorized to levy such additional assessments as may be required from time to time to pay such claims."*

There seems to have been an assumption that it would not be necessary to levy more than twelve assessments per annum to meet the maturing obligations of the society. In the first three years of its existence only eighteen assessments were levied. Thereafter assessments were levied with greater frequency, so that, notwithstanding an increase in rates, for example, from 60c per thousand at the time of organization (1888) for age thirty-eight, to 90c per thousand (1895) for the same age, the society was compelled from time to time to levy what is commonly known among fraternal insurance societies as "double headers," that is, two assessments at the same time.

Mr. Thomas joined the society in 1896. His rate was 90c per one thousand dollars. The increased rates did not apply to members who had joined before they were adopted. The resources of the society, if that term is proper, seemed to be still inadequate to meet its obligations. The Supreme Tent, through its officers and members, and through a commission aided by the advice of an actuary who is said to be an expert in the line of insurance, investigated its affairs. Without going into their findings in detail, it will be enough to say that they found that there were 234,000 members, with

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benefit certificates aggregating \$375,599,000, with accumulated funds, or so-called reserve, of \$1,950,303. The commission also found and put into figures what the experience of the society had made manifest, that the original rates were wholly inadequate to mature the outstanding certificates at twelve assessments per year. It found that, although the then face value of the outstanding certificates was \$375,599,000, the real value was not more than \$123,597,104, and that the amount to be paid by the members (upon a basis of twelve assessments per year covering the term of their expectancy) to meet this insurance was \$58,735,995, leaving a deficiency of \$64,861,109. Or, to state it in another way, the members, not having met the current cost of their insurance, must (if their certificates were to be matured, not of those who may die first, but the last as well as the first) adopt some plan to meet this deficiency, either by the accumulation of a reserve of \$64,861,109, or to so increase the rates as to make each member meet the future current cost of his own risk.

It would seem that the first plan was manifestly not feasible. The Supreme Tent adopted the only other alternative, that is, a general increase of rates. These were adopted at the session of 1904. We shall refer to them only in so far as they affect Mr. Thomas. The rate for age thirty-eight was increased to \$1.65 per thousand for each assessment. Respondent was given an option to re-rate and carry his certificate, without medical examination, at that rate at his attained age of forty-six years. This he did not do. Had respondent done so, his monthly assessment would have been \$1.65. In all other respects his certificate would have been as before. It was also provided that all members who did not elect to re-rate and who should thereafter attain the age of fifty-five should pay an assessment of \$3 per month. Not having elected to re-rate in 1904 at his attained age of forty-six at the rate of \$1.65, respondent was notified, when he had attained the age of fifty-five (1913), that he would thereafter be required to pay assessments at the rate of \$3 per

month. He began this suit to enjoin the collection of the new rate, or, in the alternative, if the court could not enjoin the new rate, he asks that the contract be rescinded as for fraud, and that he recover all sums theretofore paid to the society. From a decree enjoining the collection of the new rate, the society has appealed.

Respondent rests his case solely upon his contract. He says: "Fortunately the questions involved are few and simple, not going beyond the elementary law of contracts." The contract calls for a whole life certificate with certain endowment features after seventy years, at an assessment rate per \$1,000 of 90c. The society had adopted and published a constitution and by-laws in which the rates were published. A copy had been put into respondent's hands at the time his membership was solicited. The section fixing rates provides, among other things, that "He [the member] shall pay the same rate of assessment thereafter so long as he remains continually in good standing in the order." It is contended that this provision in the general law of the society entered into and became a part of the contract, and is in terms a specific assurance or guaranty that the rates will not be raised in the future, and because of its mention of rates, it will not be overcome by a so-called general provision on the face of the certificate that the member "will comply with the laws of the order now in force or that may hereafter be adopted."

It was so held in *Wright v. Knights of Maccabees of the World*, 196 N. Y. 891, 89 N. E. 1078, 134 Am. St. 838, 31 L. R. A. (N. S.) 423; and *Smythe v. Supreme Lodge Knights of Pythias*, 198 Fed. 967, and although his findings cover a wide range, it is the essence of the holding of the trial judge. In the *Wright* case, the whole contention of respondent is stated as follows, quoting from *Ayers v. Grand Lodge, A. O. U. W., State of New York*, 188 N. Y. 280, 80 N. E. 1020:

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“While the defendant may doubtless so amend its by-laws, for instance, as to make reasonable changes in the methods of administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the legislature as well as the association, for the obligation of every contract is protected from state interference by the Federal Constitution.”

This holding is sustained by many New York cases, which are referred to and freely quoted by the writer of the opinion.

It may be fairly said that all cases holding as do the New York cases, do so upon the theory that the society and the members are contracting parties, the one assuming to pay a certain sum in event of certain contingencies, in consideration of intermittent payments by the other pending the happening of the event. Of necessity, then, our first inquiry must go to the character and nature of the contract or certificate.

It is elementary that a contract must have parties—a promisor and a promisee. We cannot assure ourselves that respondent bears or has ever borne the one relation to the society to the exclusion of the other. The society is not organized for profit and, from the nature of things, is no more than its membership, in whom all rights and all obligations are mutual. The so-called Tent, Great Tent and Supreme Tent are not separate entities, any more than a legislative assembly is an entity distinct from the people of a commonwealth. It is an institution for convenience only; a vehicle for the collection and disbursement of funds necessary to meet the mutual obligations of the members. *Barrows v. Mutual Reserve Life Ins. Co.*, 151 Fed. 461.

“In the ordinary sense a fraternal order is not an insurance company.” *Peterson v. Manhattan Life Ins. Co.*, 244 Ill. 329, 91 N. E. 466.

The membership of such societies speak in mutual conclave through selected representatives, whose voice is their voice and whose act is their act.

"Every member, in fact, stands in the peculiar situation of being party of both sides, insurer and insured." *Korn v. Mutual Assurance Society*, 6 Cranch (U. S.) 192.

"Insurance on the mutual plan being different from insurance on the old line plan, the members of the company are, so to speak, partners." *Haydel v. Mutual Reserve Fund Life Ass'n*, 98 Fed. 200.

"The contractual relations between the members and the association should not be measured by the standard, or determined by the legal principles, which are applicable between an ordinary insurance company and the holder of one of its policies. The insured are members of the association; each has a voice in all proceedings pertaining to its business or general welfare, and in some ways it assimilates a partnership." *Miller v. National Council of Knights and Ladies of Security*, 69 Kan. 234, 76 Pac. 830.

"The fraternal plan, with mutuality and without profit, distinguishes the work of such an association from a commercial enterprise." *Reynolds v. Supreme Council of Royal Arcanum*, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154.

"The defendant was organized upon the principle of equality and mutuality among its members, and it must have been fairly within the contemplation of the parties that changes of membership might necessitate changes in rates, in order to preserve that equality . . . Each member of the society is an insurer, as well as an insured, . . . The argument that the amount of the assessment was as fixed and unalterable as the amount of benefit to be paid entirely overlooks the purpose and character of the defendant and the dual relation of its members." *Mock v. Supreme Council of Royal Arcanum*, 121 App. Div. 474, 106 N. Y. Supp. 155.

The latest expression of this principle is found in *Hartman v. National Council of Knights and Ladies of Security* (Ore.), 147 Pac. 981, where it is said:

"The contract is not purely between the individual member and the corporate organization. It is in spirit and in truth a covenant, not only with the central body, but with every other individual participating in the benefits afforded by the project, for the concern is mutual, and the co-opera-

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tion of every member is essential to its success as an insurance society . . . Moreover [she was] controlled . . . by the terms of her certificate and the laws of the order, which are made a part thereof, and to which she was subject, having had her part in the enactment of the same through her representatives."

There being no contract in the commercial sense, but a mutual promise of every member to pay the certificate of every other member, there can be no vested right in any provision of the contract, either express or implied, that is not subject to and controlled by the duty of the member to pay the cost of his own insurance, for under no construction of a mutual contract can he demand more than he is willing to give.

"Each member participates in the business results and as there are profits or losses, so is his insurance affected in its cost to him." *Swan v. Mutual Reserve Fund Life Ass'n*, 155 N. Y. 9, 49 N. E. 258.

A member cannot throw his brothers overboard under the guise of contract and vested right. He must share his life belt with all. If it is not strong enough to sustain him he is in duty bound to sink to the same level with his fellow members, for whatever the words of his contract may imply, it is to be measured by the object of the society which he has bound himself to support.

The error of the New York case and the Federal case, relied on by respondent, is fundamental. It is assumed that the subject-matter of the contract is a promise to pay \$1,000 at the death of the member, in consideration of a sum named. This is but one of the things to be considered. If we are to make any one consideration paramount over another, it must necessarily be the object of the society. When that is considered it cannot be said that any one member, or any number of members who have joined the society upon a misconception of the ability of the members to meet their mutual

obligations by the assessments agreed upon, can disassociate his own certificate or contract and insist that the object of the fraternity or society is to pay him in full without reference to his fellow members. The society being mutual and every member being subject to the same burdens and entitled to the same benefits, it follows that the society cannot be sustained unless the supreme representative body is granted authority to do that which will bring the greatest good to the greatest number. Or it being possible, in the light of present experiences, to do that which will reasonably insure the payment of all certificates, the agreement made by the member when accepting his certificate to abide by all the laws, rules and regulations of the society that may have been or that might thereafter be passed, binds him to observe such legislation as is calculated to insure a rate sufficiently adequate to pay the cost of his own insurance.

"Mutuality is its controlling feature. It is obvious, therefore, that for a benefit bestowed on one member, there must be a corresponding burden imposed on the other members collectively, and that a proper adjustment of the benefits to the burdens is essential to its existence as a mutual organization. The constitution is the fundamental compact between the members, and usually, as in the present instance, outlines the plan for the distribution of the benefits and adjustment of the burdens among them. Unerring foresight is not the gift of any man or body of men, and experience alone can demonstrate whether the plan authorized by a constitution is the best or even practicable. The welfare of the association, if not its existence, may demand a change in the constitution and a readjustment of the relations between the benefits and burdens. The association is a self-governing body, and it is for its members to determine when such change is required or advisable." *Hall v. Western Travelers Acc. Ass'n*, 69 Neb. 601, 96 N. W. 170.

"To justify interference by the courts and warrant the overthrow of by-laws enacted in the mode prescribed by the by-laws, it must be shown that there was an abuse of power, or that the later by-law is unreasonable. It is not enough to show that a better or wiser course might have been pur-

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sued, for it must be shown that there was an abuse of discretion, or that the by-law is so unreasonable as to be void. We do not affirm that a benefit society may, by a change in its by-laws, arbitrarily repudiate an obligation created by a policy of insurance, but we do affirm that, where a change is regularly made in its by-laws, and the motive which influences the change is an honest one to promote the welfare of the society, and the members are all given an opportunity to avail themselves of the change, no actionable wrong is done the members or their beneficiaries. It may sometimes happen that the interests of one individual, or of a few individuals, may be impaired, but it is the right, and, indeed, it is the duty, of the society to protect the interests of the many rather than of the few. Persons who become members of such societies must take notice of this, and one person cannot, therefore, demand that the welfare of the society and the interests of the many be sacrificed for his sole benefit." *Supreme Lodge, Knights of Pythias v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

Nor are these observations met by the suggestion that appellant was in a way lured into an improvident undertaking by the provision of the by-law fixing rates which we have quoted, the speeches of the officers of the Supreme Tent, or other matters tending to show an estoppel. There being no contract in the strict sense, there can be no estoppel. When respondent joined he agreed, in consideration of a promise on the part of other members to pay him a certain sum, that he would, in turn, do all that would be required of him. He became an insurer as well as an assured. He cannot get away from his associates if he would. He must meet his obligation to them, and all this legislation does is to call upon him to pay his own cost as a member. To this end he agreed to be bound by the laws and rules of the order and such changes as might thereafter be made.

"There is no vested right in having the contract in the certificate remain unchanged, because the recognition of the power to make new by-laws is necessarily a recognition of the right to alter or amend those theretofore made." *Klein v. Knights & Ladies of Security*, 79 Wash. 173, 140 Pac. 72.

In the same case we said:

"To destroy a vested right arising out of a contract is, in some way, to impair or destroy the rights guaranteed by the contract; not to enforce them."

It seems idle to attempt to add to the force of this language. If we were to attempt it, we would say that there can be no vested right in any contract so long as a duty to the other contracting parties rests upon the one asserting it and his duty is unperformed.

It is lamentably true that most if not all of the fraternal benefit associations with which courts have been called upon to deal in recent years were founded upon false assumptions and self deceptions; a purpose to make something out of nothing; to have others do for us, without doing our whole duty to ourselves and to them. And the pity of it all is that those who promoted and organized such associations, as well as those of us who have joined them, were undoubtedly honest in our beliefs. We did not know the horse was blind until we took him out on the road. Insurance societies have been generally organized and built up among young men. Low death rates for the first few years made a show of prosperity. Time, the increasing age and mortality of the membership, has brought them face to face with the problem of paying those who die in age, as they have paid those who died in youth. It took nearly fifty years for the truth to rise to the surface of our infatuations, and the consequent realization that a new member who in fact was not paying the cost of his own insurance was a liability and not an asset. We were foolishly blind to the simple equation that if ten men mutually promise to pay each other \$1,000 at death, \$10,000 must be gathered from the promisors if all of the contracting parties are to be paid. To illustrate, it is asserted in the briefs, and is not denied, that respondent, between the time he joined the order and the time he brought this suit, had paid into the order \$169. If he should attain the age of

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seventy years he would have paid in an additional \$162, at twelve assessments per year. Wherefore then can he claim that the society, himself and his co-members, shall continue a plan that must surely bring inevitable ruin and leave the greater part of its certificates unpaid, when a resort to business principles will insure stability? At fifty-five his life expectancy is 17.40 years. If he pays an assessment at the new rate from now on he will have paid in at the expiration of that time \$626.40, which added to \$169 makes a total of \$795.40, which we may assume will be sufficiently increased by interest accumulations to make up a sum sufficient to mature his certificate or meet his obligation to the society, whichever way it is put. Hence respondent was bound to know, as were all members of the society, that their plan was inadequate; as much so as if they had each agreed to pay in so much from month to month for a term of ten years and buy a piece of property at a certain price. No one could thereafter claim imposition or fraud, when a simple calculation would have shown that the net accumulations would not be more than fifty per cent of the necessary amount.

"The theory that a mutual association can afford to carry its members at less than cost on account of its increasing membership is as fallacious as that of the merchant who said he could afford to sell goods at less than cost because he sold so many of them." *Supreme Ruling of Fraternal Mystic Circle v. Ericson* (Tex. Civ. App.), 131 S. W. 92.

For these reasons it is held by the greater number of cases and, as we think, by the greater weight of authority, that it is within the legislative power of these associations to increase rates to the plane of adequacy. As said by the supreme court of the United States:

"There is no vested right to a continuation of a plan of insurance which experience might demonstrate would result disastrously to the company and its members." *Wright v. Minnesota Mutual Life Ins. Co.*, 193 U. S. 657.

The test of a vested right is thus defined in 3 Am. & Eng. Ency. Law (2d ed.), p. 1065:

"The true criterion appears to lie in the determination of the question whether or not an actionable property right has in fact accrued; if so, it cannot be divested; but it is otherwise in case such rights are only prospective, or in process of accruing, when they may be changed or arrested by the association under the general governing power, provided the member, in his contract of membership, has agreed to conform to after-enacted laws."

This definition is sustained by practically all of the authorities. Respondent has no right to insist that the society shall carry his certificate at a loss because of the form of the by-law at the time he took out his certificate. His position is not tenable, for no member of a mutual insurance society has a right to insist that it continue to do business upon an unsound basis for his individual benefit.

Respondent complains that, in the plan proposed, no attempt was made to meet the alleged deficiency in rates by a general increase upon all of the members; that the entire burden is cast upon those who attain the age of fifty years, thus forcing members of fifty-five years and over into a class to take care of themselves as if there were no other members. Respondent overlooks the fact that the mortality tables show that, at about the age of fifty-five, the adequacy of the original system begins to break down. It is not an arbitrary age or date fixed by the society producing a class distinction. It is the working of the law of experience, which has demonstrated that the danger of default to the members among these societies has increased under old plans in geometrical proportion after the member has reached an age, approximating fifty-five years.

However, it would seem that in these days of understanding, born of experience, that the fallacy of the "new blood" theory had been exploded, or if there had ever been anything in it, that no lodge could hope to succeed by loading the rate upon men still young enough to find insurance at cost, or

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upon men who have been paying their own way, to make up a deficiency for those who had not.

"The new blood theory is simply a method of selling obligations to mature in the future at less than their face or cost, and using the money thereby obtained to temporarily meet the maturing obligations of the institutions. It works out simply to the end of accumulating liabilities for which no provision has been made, and for which, under the cumulative force of increasing obligations maturing more and more rapidly, no provision can be made in the end, and thereby results in ultimate bankruptcy." Anon.

If we assume that a society might lawfully load young men and new members to make up the valuation (See Laws of 1911, Ch. 49, p. 292, § 229; (3 Rem. & Bal. Code, § 6059-229), the result would in all probability be disastrous. The young man in health would most likely go into some order where he would not be subject to such an imposition. There would be no new members.

"The chief complaint seems to be that other younger men were not raised so much in their assessments, and some were even reduced; but this was the result of making the basis of assessment the age of the member and the estimated cost of his insurance. It was evident that the old plan was a failure, and the court of chancery appeals report that some change in the assessment plan was necessary to accomplish the objects and purposes of the order and to save it from dissolution. It must be evident that the younger men would not be burdened with the heavy cost of insurance upon the older ones, and they would not join the order, and would withdraw, if such a rule was attempted; and this would leave the older men with no one but the old ones upon whom to rely for their protection. As we view it, the effect of this rule was only to accentuate the disabilities of old age, after the insured had enjoyed indemnity for many years at less than cost; and we cannot see that the basis of assessments was unreasonable." *Conner v. Supreme Commandery Golden Cross*, 117 Tenn. 549, 97 S. W. 306.

Respondent says that if the whole burden is put upon the old members he will be turned out and all fraternal features of

the society destroyed. This may be true in a sense, but experience has no doubt taught the lesson that the fraternal features of these societies cannot be depended on to mature deficiencies in other men's certificates running into the millions. Fraternity that will adorn a ritual is one thing; fraternity that will balance the debit side of the ledger is quite another thing. Each life must pay the cost of its own experiences and the penalties attaching to its own mistakes.

There are some cases which would sustain the decree of the lower court, but the great majority of the courts have held to the contrary. Among the more prominent cases sustaining our view and which we have not already cited in this opinion, are: *Gaines v. Supreme Council of Royal Arcanum*, 140 Fed. 978; *Gaut v. Mutual Reserve Fund Life Ass'n*, 121 Fed. 403; *Schmierer v. Mutual Reserve Fund Life Ass'n*, 153 Cal. 208, 94 Pac. 887; *Champion v. Hannahan*, 138 Ill. App. 387; *Supreme Lodge Knights of Honor v. Bieler* (Ind. App.), 105 N. E. 244; *Messer v. Grand Lodge, A. O. U. W.*, 180 Mass. 321, 62 N. E. 252; *Wineland v. Knights of Maccabees of the World*, 148 Mich. 608, 112 N. W. 696; *Williams v. Supreme Council of the Catholic Mut. Benefit Ass'n*, 152 Mich. 1, 115 N. W. 1060; *Shepperd v. Bankers' Union of the World*, 77 Neb. 85, 108 N. W. 188; *Clarkson v. Supreme Lodge Knights of Pythias* (S. C.), 82 S. E. 1043.

Respondent concedes the right of a society to increase rates from time to time if it has reserved the right to do so in its by-laws. He seems to distinguish the cases upon which appellant relies, by asserting that in none of them was there an assurance in the by-laws that the rate would continue for the life term. There is apparent ground for this contention, but it does not bear the test of reason. For, after all, the so-called warranty is a by-law. The right to amend does not except any one or more of the by-laws. It is a general reservation. And furthermore, there can be no difference in principle between an assertion in the by-laws that the member will be required to pay no more than the published rate during

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his life, and the publication of the rates without such assurance. When it is remembered that the rates of such societies are almost always fixed in their by-laws, and that members join upon the understanding that they are taking a life certificate at a certain rate for life, we cannot escape the conclusion that there is no ground upon which the cases can be distinguished. In the one, the so called contract is express, in the other it is implied. When reduced to their lowest terms, the fact that some cases hold one way and some another way is apparent to all. It will not be asserted that respondent did not assent to a representative form of government. It is provided for in the same way as the rates are fixed, by a by-law. The representative body has spoken for him. Its act is his act and is binding upon him, so that

“Whether this reasoning is strictly correct we need not decide, for here we have an objecting member, who on his own account has agreed not only to conform to the present laws of the order, but also to such future laws as may be from time to time enacted by the official body governing the same, and as to such contracts the better reasoned cases hold that assessments may be raised by such societies under such reserved power to amend by-laws.” *Supreme Lodge Knights of Honor v. Bieler, supra.*

Neither are we prepared to hold that the increased rate is a violation of respondent's contract. Under his certificate as written, the society might levy any number of assessments. He agreed, in consideration of the promise of his fellow members to pay his beneficiary \$1,000 at death, to pay all assessments necessary to meet death losses. It was held in *Wine-land v. Knights of Maccabees of the World, supra*:

“We have no doubt that it was lawful, and no violation of contract rights, for defendant to increase the number of assessments to meet the demands arising from the death of members. There seems to be no good reason why fewer assessments, at a greater rate, should not be levied, so long as the increase in rates is proportional; young and old members, alike, contributing. Whether such action be a mere detail

in management aimed at procuring for distribution the same sum of money in a different way, or intended to actually increase the contributions over present necessities for distribution and to accumulate a fund, it may be, so long as it is proportional and reasonable, supported, as against a protesting member, by his agreement in his application to conform to and be governed by laws to be from time to time made by the representative governing body of the association."

See, also, *Supreme Lodge of Fraternal Union of America v. Ray* (Tex. Civ. App.), 166 S. W. 46.

Although it is not necessary to our decision, it may well be questioned whether a court of equity could interfere to protect respondent. His grievance goes not to the amount of his assessment, for the society could levy a like amount under its old rates, but to the method. Having in mind the character of the society and its objects, it would seem that there is no room for equitable interference, for by his assent to unlimited assessments, respondent has subscribed to the right of the society to perpetuate itself. In law he has acknowledged that

"There must be a premium *somewhere* which represents the normal cost of permanent insurance, which is based upon the law of mortality, and below which point no organization, on any plan, can safely promise permanent insurance protection at a uniform price for life." Anon.

Respondent further contends that, inasmuch as there is a reserve fund of something like \$12,000,000, the society cannot raise his rate until that is exhausted. In other words, granting the right to the society to raise rates in the event of a necessity, that such necessity is not present; that the society is, because of such surplus, in a flourishing and prosperous condition.

It is likely that there is no word in the lexicon of business terms so little understood or so misapplied as the word surplus or reserve, when used in connection with mutual insurance companies or societies. A surplus accumulated over the necessities of an old line life company is a tangible thing to

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which any policy holder or creditor may look for the satisfaction of his claim. It is an asset of the company. On the other hand, an apparent surplus of a fraternal society may be merely a mortality fund, or an accumulation to meet a deficiency in rates, so that in the end the accumulation will balance the deficiency. It generally represents a loading, over what may be called a possible minimum contract rate. It is a modern thing among fraternal societies. Indeed, the thought was generally discountenanced in their earlier years. Necessity has driven them into the only open port. An accumulation to balance the deficiency in rates is a bridge over which the society may pass from the quicksands of bankruptcy to the high ground of business solvency. The surplus or reserve, whichever it may be called, is a trust fund, and in that sense is in truth a liability and not an asset. Its purpose is to pay death claims, not to retire policies during the life of the member; and until it is shown that the society is collecting more than is reasonably necessary to insure its solvency, no living member can claim a remedy or an individual interest in it. Under the record before us, the so called surplus is a mortuary fund. The member has no vested interest and no power to control its disposition during his life. Its disposition, within legal bounds, is for the officers duly elected and authorized to act for the society. Niblack, *Benefit Societies and Accident Insurance* (2d. ed.), p. 238; *Kentucky Mutual Security Fund Co. v. Turner*, 89 Ky. 665.

A like contention was made in the *Ericson* case, and answered in this way:

"The facts show that appellant had paid all death claims and other benefits that had accrued, and had left in its treasury in 1908 \$225,000 subject to the payment of such claims as there should thereafter accrue. But that appellant was therefore 'in good financial condition,' or that this sum was 'surplus assets over all liabilities,' is a *non sequitur*—a fallacy that has proved the undoing of many life insurance companies, and especially fraternal associations. What are the

assets of a life insurance company? The money which it has in its treasury and the money which it will hereafter be able to collect under its contracts with its policy holders, above its necessary expenses. What are its liabilities? The amounts unpaid on claims that have already accrued and the amounts which it has promised to pay by its contracts of insurance which will accrue in the future. If its assets exceed its liabilities as thus stated, it is in good financial condition; otherwise it is not. Many fraternal insurance orders honestly conducted have been lured to their destruction by this mirage apparent of accumulated surplus during the early period of their existence. Among institutions born of the wisdom, philanthropy, and altruism of modern times, none are more capable of or are accomplishing greater good than mutual fraternal benefit societies, and it is encouraging to see some of them awakening from this delusion to which too many of them have been given over. A mutual insurance association has no capital stock, and can pay its policy holders only out of the money paid in by them and the accumulated interest thereon. A statement of its affairs at an early period of its existence may show what is frequently called a surplus, when it is hopelessly insolvent in the sense that it cannot possibly meet its future obligations. . . . In 1907 this order had insured its members in the sum of \$39,937,000. This was its liability. Its real assets were not the so-called \$225,000 surplus in its treasury, but the amount that it would collect from its members in the future. Whether or not it was in good financial standing depended upon the adequacy of its rates, which it appears was not considered by the court."

The insurance code seems to have been drawn upon this theory. After declaring that societies may create and invest a surplus, and that the society may grant paid up or extended insurance if so provided by the laws of the society, it says:

"Such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made." Laws of 1911, p. 279, § 210 (3 Rem. & Bal. Code, § 6059-210); and

"No member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the

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surrender of any part thereof, except as provided in section two hundred ten." Laws 1911, p. 281, § 214 (Id., § 6059-214).

The reserve is still far short of the deficiency in appellant's contracts, and inasmuch as the undisputed facts show that respondent has not met the cost of his own insurance, it follows, if his argument were otherwise sound, he has no interest in the reserve.

Respondent contends that his contract has been violated in this, that his insurance has been changed from a semi-endowment policy maturing at the age of seventy years, to a straight life policy. We do not concede that this question is before the court at the present time, although some of the authorities cited in this opinion sustain the right of the society to make such change.

Neither has respondent a right to rescind and recover the amount paid as dues and assessments. The society has not repudiated its contract; it is endeavoring to perform it. Respondent's contributions to the society have not met the cost of carrying his certificate, and so long as he has had protection for less than cost, he cannot complain.

This is the first time the question raised by this appeal has been before our court. Because of its importance and the far reaching effect of our decision, we have endeavored to make it plain that a member of a beneficiary society having a democratic or representative form of government has no right, under a certificate providing for a change of by-laws, as does the certificate held by respondent, that can be called vested, except a right to insist that the face or amount to become due under his contract shall not be lessened or impaired; that the object, plan, spirit and purpose of such a society is written into its certificate; that the true meaning of the promise to obey its rules and regulations and such changes and amendments as thereafter may be made is that the society may from time to time correct its mistakes, or take such steps as may be necessary to keep its promises, and further, where it appears to be necessary, it is a recognition

of a duty resting upon the society so to do; that a member has a vested interest only in the object of the society, and in turn impliedly agrees, notwithstanding the state of the by-laws at the time of joining, that the society may so legislate that its certificates, whether matured by death or time, will be worth their face; that the accomplishment of this purpose is a mere detail, and so long as all members similarly situated are treated alike and no member is called upon to pay more than the cost of his certificate, as may be determined by the mortuary and experience tables recognized by the laws of this state, there can be no just cause of complaint on the part of any one; that a by-law fixing impossible rates, followed by a clause saying that such rates shall continue so long as the member remains in good standing, is to be measured by the objects of the order and is of no higher order than any other by-law, for the very evident reason that the object of the society to pay the face of each certificate cannot be accomplished unless such by-law is amended.

It may seem that our holding works a hardship to those of us who became members in our younger days, but the mistake was ours. The society was not to blame. Our mistake was its mistake; but whatever the result may be to those of us who have passed the age limit, we have had insurance for which we have paid less than cost, and under the holding of the courts and legislative enactments in most of the states, such mistakes will not occur again, and fraternal insurance will be in the end what it assumed to be in the beginning—insurance at cost, and as sound as any insurance of whatever kind can be.

It should not be understood that we are holding that a member has no remedy against the fraudulent and arbitrary acts of the officers of a fraternal society. The question in this case goes solely to the power to legislate in representative assembly, and whether such legislation can affect respondent's initial rate of assessment. If we have not made these things plain and our reasoning is so far faulty, it would seem that our holding is nevertheless compelled by a consideration of

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the provisions of the insurance code, Laws of 1911, p. 161, ch. 49 (3 Rem. & Bal. Code, § 6059-1 *et seq.*).

That these societies were organized, and for many years have continued to do business, upon a fundamentally unsound basis has become known to all who have had the interest or the courage to make a simple arithmetical calculation. It has been found that, in so far as maturing certificates upon the lives of members is concerned, fraternity is not always a dependable factor. This condition became apparent to most of these societies a long time ago, and some of them have attempted to meet the situation by their own efforts and by appropriate legislation within their governing bodies. Progress has been slow. Men are loath to lose faith in their ideals. Wherefore, to insure the future stability of societies then doing business, and to prevent the organization by designing men of new societies with inadequate rates and which could not be promoted, in the light of the experience of other societies, without practicing fraud upon prospective members, the state, in the exercise of its sovereign right to regulate insurance companies, has defined the status of fraternal benefit societies and provided the terms under which they may do or continue to do business in the state of Washington. Laws of 1911, p. 281, ch. 49, art. VI, § 214 (3 Rem. & Bal. Code, § 6059-214). It provides:

"That no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state, which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the National Fraternal Congress Table of Mortality,"

and that after 1913 all societies now doing business in the state shall be subject to the law. It provides for annual reports to the insurance commissioner and a valuation of existing and outstanding certificates and a standard of valuation, and further,

"The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay

all matured death and disability claims in full and to provide for the creation and maintenance of the funds required by its laws additional, increased or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five per cent per annum." Laws of 1911, p. 290, art. VI, § 228 (3 Rem. & Bal. Code, § 6059-228).

And further, that if the valuation shows a deficiency of more than ten per cent, the society must reduce such deficiency at a rate of not less than five per cent each three years succeeding. Section 229, p. 292 (Id., § 6059-229). It is made the duty of the insurance commissioner to wind up the affairs of any society which has not complied with the law or is not carrying out its contracts in good faith (we take it that good faith is to be measured not by the intent, but by the statute). Section 230, p. 293 (Id., § 6059-230).

The rate fixed by the society for the respondent, and which by reference to the statute we are bound to assume is necessary to mature his certificate, being no higher than the National Fraternal Congress rates, it follows that respondent cannot complain, for the society has done only what the state would have required but for its voluntary action. The law of the state is a part of every contract of insurance. *Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122.

"Compliance with the general laws of the state affecting such corporations [Benevolent and Beneficial Associations] is as essential to their continued existence as to their creation." 3 Am. & Eng. Ency. Law (2d ed.), p. 1049.

This is a suit in equity, and the allowance of costs is a matter within the discretion of the court. The case has an importance to the appellant aside from the reversal of the case. It is a test case which affects, not alone the respondent, but every member of the society. A penalty should not be put upon a member because he has seen fit to question the act

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of the appellant in raising its rates. The briefs and abstract filed by appellant are, in the judgment of the writer of this opinion, unnecessarily long, and if costs were allowed for them it would, in a way, operate as a penalty. Considering, then, the nature of the case and the good faith of the respondent, and the fact that the opinion affects every member of the order, we have decided that the costs shall be borne by the appellant.

The decree of the lower court is reversed, and the cause remanded with instructions to enter a decree denying to respondent the relief prayed for in his complaint.

MORRIS, C. J., MOUNT, and PARKER, JJ., concur.

HOLCOMB, J., took no part.

[No. 12311. Department Two. June 3, 1915.]

SOPHIE J. MYERS *et al.*, Appellants, v. CALHOUN, DENNY & EWING, now C. D. & E. Investment Company,
Respondent.¹

VENDOR AND PURCHASER—RESCISSION BY PURCHASER—MISREPRESENTATIONS—SUFFICIENCY OF EVIDENCE. Rescission of a contract for the sale of land will not be granted for fraud in representing that the land was adapted to the raising of high grade winter apples, where the testimony as to the adaptability of the land for orchard purposes was conflicting and there was testimony to the effect that alfalfa was prospering on the land, that the plaintiffs spent only a few months on the land preparing it for irrigation and planting, and after finding that the expense was greater than they anticipated, sought to get a reduction in the price; that plaintiffs, while not practical farmers, possessed the powers of observation and judgment and had opportunities to observe the soil and condition of neighboring orchards planted upon land of the same character; and did not attempt to rescind until more than two years after the purchase, at a time when they were in default upon payments due, lien claims had been filed against the land for work thereon, the lands in that locality had depreciated in value, and attempts to resell the property had failed.

¹Reported in 149 Pac. 19.

VENDOR AND PURCHASER—RESCISSION BY VENDOR—WAIVER—NECESSITY OF DEMAND. Where the purchasers under a real estate contract for the sale of land on time payments are waging an action of rescission and thus repudiating the contract, they are not in a position to insist that no forfeiture could be declared by the vendor for non-payment of installments due without demand made and the lapse of a reasonable time for compliance therewith.

Appeal from a judgment of the superior court for King county, Mitchell, J., entered March 30, 1914, in favor of the defendant, in an action for rescission, tried to the court. Affirmed.

Walter S. Fulton and Donworth & Todd, for appellants.

John P. Hartman and Arthur E. Nafe, for respondent.

MAIN, J.—The purpose of this action was to secure a rescission of a real estate contract, claimed to have been induced by fraudulent representations, and for damages incurred in improving the land covered by the contract. After the issues were framed, the cause was tried to the court sitting without a jury, and resulted in a judgment in favor of the defendant. From this judgment, the plaintiffs appeal.

On January 8, 1910, the defendant contracted to sell to the plaintiffs a certain tract of land consisting of approximately forty acres, located in Benton county, Washington. The purchase price of the land was \$6,000. On the date the purchase money receipt was issued to W. E. Myers, one of the plaintiffs, there was paid the sum of \$500. This purchase money receipt contained the provision that,

“It is expressly understood and agreed that this deposit is to be returned to the purchaser if upon inspection by him on or before February 8, 1910, the above described land is found to be not as stated in the following paragraphs: 1. The land is good fruit land of easy slopes and cultivable character. . . .”

The other paragraphs referred to are not here material.

Mr. Myers did not visit the land, owing to the fact that he was told by the sales agent, Mr. Elwell of the respondent

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company, that it was then likely covered with snow. During the negotiations, which took place prior to making the initial payment and giving the purchase money receipt, the plaintiffs were given a booklet or prospectus, which contained matter descriptive of the land. The paragraph in the booklet covering the subject of soil is as follows:

“Soil. As is quite generally known, the genuine fruit soil of the Yakima Valley is denominated volcanic ash loam. This peculiar formation is found in but few parts of the country and is necessary to the production of the high quality commercial fruit of which the world has heard so much. As it varies in depth and texture in different parts of the Yakima Valley, choice of land for purely orchard purposes must be carefully made. The soil of Red Mountain Orchards is peculiarly adapted to the raising of high-grade winter apples,”

The respondent at the time was selling the lands denominated in the prospectus as “Red Mountain Orchards, Yakima Valley, State of Washington.” Some days after the purchase money receipt had been given, a formal contract of sale was executed. This contract is dated January 11, 1910. The purchase money receipt provided that:

“Regular contract to be executed within ten days from the date hereof.”

The contract of purchase, as well as the purchase money receipt, provided that the balance of the purchase price, to-wit, \$5,500, was to be paid semi-annually thereafter, on or before the dates of July 15, and January 15. Deferred payments were to draw interest at 7 per cent per annum. This contract made time the essence thereof, and provided that:

“In case of failure of the second party [the purchaser] to make any payment or perform any of the covenants made herein, at the option of the party of the first part, this contract shall be null and void, and all payments made hereunder shall be forfeited and retained by the party of the

first part in full satisfaction and liquidation of all damages sustained."

After the execution of the contract, the payments falling due on July 15, 1910, and January 15, 1911, respectively, were paid when due. With each of these payments, the accrued interest was paid.

During the month of March, 1911, the appellants moved upon the land, and employed one C. E. Morgan, who had owned and resided on land in the vicinity for a number of years, to take charge of the improvements which they contemplated making, such as clearing, grading, fencing, and planting. Under the direction of Mr. Morgan, approximately \$4,000 was expended upon the land. A small portion was planted to fruit trees. The plaintiffs remained upon the land until about the first of July, 1911. They then returned to Seattle, and Mr. Myers called upon the president of the defendant company in an effort to get the price of the land reduced, because the grading and putting the land in shape for cultivation was costing more than the appellants had anticipated. No reduction in the price was made; but during the conversation, the president of the defendant company told Mr. Myers "not to worry about the payments, that they would be as easy as possible." This is the version of the conversation as given by Mr. Myers, and is not controverted in any material respect by the respondent. Soon after this conversation, Mr. and Mrs. Myers went to Arizona, where they remained until the summer or fall of 1912. The \$500 payment and accrued interest due on July 15, 1911, was not paid, but on March 9, 1912, the \$500 falling due on July 15, 1911, was paid. This payment did not include any accrued interest. No payment was made or tendered under the contract subsequent to the payment of \$500 on March 9, 1912.

During the time the appellants were in Arizona, the land was given practically no care or attention by any one, and by reason of this fact much of the money expended in improvement was practically lost. On July 10, 1912, the ap-

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pellants leased the property to one A. E. Wahn for a term of years terminating on the first day of November, 1915, for the cultivation principally of alfalfa. Little was done by Wahn under this lease because, as he testified, Mr. Myers declined to acknowledge it before a notary or other proper officer. After the return of the appellants from Arizona, and some time during the month of October, 1912, they were advised by one F. O. Huntley, a horticulturist, that the land covered by the contract was not volcanic ash loam, and was not adapted to the raising of high-grade winter apples. Thereafter, and on the 29th day of October, 1912, they caused their attorneys to address a letter to the respondent. This letter claims that the land was not as represented, and suggested reparation for the damage. What reply, if any, was made to this letter does not appear.

On January 24, 1913, the present action was instituted for the purpose, as above stated, of securing a rescission of the contract, and for damages. On the 8th day of May, 1913, the defendant answered the complaint. On August 28, 1913, the respondent served written notice upon the appellants declaring the contract cancelled for failure to make the payments as provided for, and declaring a forfeiture of all money paid, as liquidated damages. On October 15, 1913, the respondent sold and conveyed the lands covered by the contract, together with twenty-five other and adjoining acres, which last mentioned land was about half the value per acre as the first, to one Samuel Archer for the sum of \$6,500; cash \$5,000, and a mortgage back for \$1,500. Thereafter, on October 24, 1913, Archer leased the land to A. E. Wahn, who was then in possession under his former lease from Mr. and Mrs. Myers, and contracted to sell him an undivided one-half interest therein. After the trial, a judgment was entered cancelling the contract and forfeiting to the respondent, as liquidated damages, the money which had been paid thereon.

This case presents two questions: First, Was the land covered by the contract adapted to the raising of high-grade winter apples? and second, Was the forfeiture notice given by the respondent effective?

I. The claim that the land was not as represented is based principally upon two grounds: (a) That it was not volcanic ash loam, and (b) that it was not adapted to the raising of high-grade winter apples. The oral representations made during the time the negotiations for the sale were pending were not in any material respect different from those contained in the prospectus. Much of what is contained in the paragraph in the prospectus, above quoted, is the expression of an opinion. It is not claimed that the action can be based upon anything else than a misrepresentation as to a fact. The representation was not that the soil was volcanic ash loam, but a general statement that it was quite generally known that "the genuine fruit soil of the Yakima Valley is denominated volcanic ash loam." This was a limitation of the term "volcanic ash loam" to what was generally denominated as such when applied to Yakima Valley. The other statement, that "the soil of Red Mountain Orchards is peculiarly adapted to the raising of high-grade winter apples," is the one upon which the appellants mainly rely. The appellants cite authorities for the purpose of supporting their contention that this is a representation as to a fact, while the respondent cites authorities in support of its contention that even the statement last quoted is the expression of an opinion and not the assertion of a fact. Without reviewing these authorities, it will be assumed, for the purposes of the present case, that the representation is one of fact and not the expression of an opinion. The question then arises whether the lands covered by the contract were in fact adapted to the raising of high-grade winter apples. The appellants claim, and their evidence tends to support the position, that the land was not adapted to that purpose. The respondent claims that the representation that the land

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was adapted to the raising of high-grade winter apples was true in fact, and the evidence introduced in its behalf tends to support this claim. It is argued, however, that the evidence of the appellants' witnesses should be given great weight because of their superior knowledge and qualifications to speak as to the character of the soil. It must be admitted that at least one of the appellants' witnesses possessed more scientific knowledge than any of the respondent's witnesses. But the testimony of this witness seems to prove too much. Among other things he testified:

"The character of the soil of these tracts is almost pure sand. I should say 99% sand, and is of no value except for building material. It is of no value whatever for agricultural purposes. It would not grow winter apples or anything else, because it lacks plant food."

This scientific testimony is met, in a measure at least, by the fact, to use the language of the trial court, that such proof is "at variance with the demonstrated fact that domestic vegetable matter, alfalfa, is prospering on the land." It seems a little strange, if the land was not as represented, that the appellants would not have discovered this fact long prior to the month of October, 1912. During the interim between the purchase and this date they had lived three or four months upon the land and expended a large sum of money in clearing and grading, preparing it for planting and irrigation. They had also attempted to dispose of the land by sale. While upon the land they had opportunities to observe the soil, and the condition of the orchards planted upon land in the community of the same character. But it was not until after this long lapse of time, when a number of payments due under the contract were in default, attempts to resell the property had failed, lien claims had been filed against the property for work performed thereon, and these and other lands of the same character had depreciated in value to the extent of 40 per cent, that they learned,

through the advice of the horticultural expert, that the soil was not volcanic ash loam, and was not adapted to the raising of high-grade winter apples. It is no answer to say that the appellants were not practical or experienced farmers, and had at no time resided upon a farm until they went upon the land in question. They were intelligent people and possessed the powers of observation and judgment. While the trial court made no findings of fact, there was necessarily inherent in the judgment which was entered a finding that the land had not been misrepresented. Otherwise there would have been a different judgment. From a careful reading of the evidence as it appears in the appellants' abstract, and the exhibits introduced in evidence, we are of the opinion that the appellants failed to show that the land was not adapted to the purpose for which it was purchased.

II. As appears from the facts above stated, the respondent, on the 28th day of August, 1913, gave notice that the contract was forfeited, and that the payments already made would be retained as liquidated damages. It is claimed that, notwithstanding the contract provided that time should be of the essence thereof, and contained a forfeiture clause, this notice was ineffective, because the term of the contract making it the essence thereof had been waived by the respondent. The rule is well settled that after a vendor has waived the essence clause of a contract, the purchaser may not be put in default until after a demand has been made upon him for a compliance with his contract, and a reasonable time has elapsed in which to comply with the demand. *Whiting v. Doughton*, 31 Wash. 327, 71 Pac. 1026; *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. 1096; *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500; *Opsjon v. Engebo*, 73 Wash. 324, 131 Pac. 1146. But this rule does not necessarily mean that the vendor can at no time extend any indulgence to the purchaser without waiving the essence clause in the contract. *Garvey v. Barkley*, 56 Wash.

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24, 104 Pac. 1108. It is only when it can be said that the language or conduct of the vendor is such as to indicate a purpose to waive the right to forfeit that such right will be denied without demand and a reasonable time to comply therewith. *Boger v. Bell*, 84 Wash. 131, 146 Pac. 179.

Whether the right to rely in the present case upon the clause in the contract making time the essence thereof was waived by the fact that one payment was accepted after it became due and the president of the defendant corporation told Mr. Myers, one of the appellants, not to worry about the payments, that they would be as easy as possible, need not now be determined. The facts in this case call for the application of a different principle. When notice of forfeiture was served, the appellants were waging the present action against the respondent, claiming a rescission of the contract. Having taken the position that the contract was or should be rescinded, the appellants were not in a position to insist that the respondent had waived its right to rely upon the essence term in the contract. They could not, in the same action, ask for a rescission and an enforcement of the contract. They were not seeking or attempting to comply with the contract, but were repudiating it.

In *Gibson v. Rouse*, 81 Wash. 102, 142 Pac. 464, the vendor withdrew real estate contracts from escrow without right. Thereupon the vendee, without tendering performance on her part, brought the action for the return of the purchase money. It was there held that the vendors "having repudiated the contract without right, they cannot complain that the respondent met them on the ground which they themselves had elected to occupy. Having themselves rescinded the contract, the respondent was relieved from an offer of performance on her part." In this case the parties are in the reverse position. Here the vendees repudiated the contract. The vendors had the right to meet them upon their own ground and claim a forfeiture without tendering per-

formance of the contract as modified by the elimination of the essence provision. The principle must be the same whether the contract be repudiated by the vendor or by the vendee. If the appellants were here desiring to perform the contract, and asking to be permitted to make the delinquent payments, a different question would be presented. It is apparent from the record that they do not desire to go forward with the contract. The land has depreciated in value and, owing to the lack of proper care, the money originally expended in improvements, while considerable in amount, has not added greatly to the value of the land.

The judgment will be affirmed.

MORRIS, C. J., ELLIS, and CROW, JJ., concur.

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Opinion Per Curiam.

[No. 12224. Department Two. May 27, 1915.]

C. A. GWINN, *Respondent*, v. ANNA D. FORD, *Appellant*.¹

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 30, 1914, in favor of the plaintiff, upon sustaining a demurrer to the affirmative defenses, in an action upon a promissory note, tried to the court. Reversed.

Mulligan & Bardsley, for appellant.

PER CURIAM.—This is a companion case to that of *Gwinn v. Ford*, ante p. 571, 148 Pac. 891, and for the reasons therein given, the judgment will be reversed.

[No. 12260. Department One. May 27, 1915.]

ROSE STEELE, *Appellant*, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *et al.*, *Respondents*.²

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 16, 1914, in favor of the defendants, upon the pleadings, dismissing an action for damages to property by the construction and operation of a railroad. Affirmed.

Skuse & Morrill, for appellant.

F. M. Dudley, *Geo. W. Korte*, and *F. M. Barkwill*, for respondents.

PER CURIAM.—The questions involved in this case are the same as those involved in *Taylor v. Chicago, Milwaukee & St. Paul R. Co.*, ante p. 592, 148 Pac. 887. For the reasons assigned in the opinion in that case, the judgment rendered by the superior court in this case is affirmed.

¹Reported in 148 Pac. 892.

²Reported in 148 Pac. 890.

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ADOPTION:

1. **ADOPTION—ABANDONMENT—WRITTEN CONSENT OF PARENT.** Rem. & Bal. Code, § 1696, requiring the consent of a parent to the adoption of a child by another, dispenses with such consent and substitutes that of the legal guardian where the parent has abandoned the child; but, even if consent of the parent were necessary in cases of abandonment, a writing by the mother to another, turning over "my right and title" to the child, would be sufficient evidence of consent. *In re Potter*..... 617
2. **ADOPTION—ABANDONMENT BY PARENT—SUFFICIENCY OF EVIDENCE.** Abandonment by a mother of her illegitimate child is established by a showing that, within a few hours after its birth, she expressed her dislike for the child and her desire to get rid of it; that she gave it to a woman who offered to adopt it, and several days later gave such foster mother a writing, turning over all her right and title to her baby girl; that she never thereafter concerned herself about the child nor contributed in any way to its support; and that, on being served with notice of the adoption proceedings, she contented herself with filing an objection without taking the trouble to put in an appearance at the hearing. *In re Potter*..... 617
3. **ADOPTION—WELFARE OF CHILD.** In matters of adoption, the dominant question is the welfare of the child and the wishes of the parent will be subordinated to that consideration. *In re Potter* 617

ADVANCEMENTS:

- On future sales of wheat in warehouse, see **SALES**, 5.

AFFIDAVITS:

As part of record on appeal, see **APPEAL AND ERROR**, 15.

AGREEMENT:

See **CONTRACTS**.

ALIMONY:

Pendente lite, see **DIVORCE**.

ALLOWANCE:

Of costs on appeal, in equity suit, see **COSTS**.

AMENDMENT:

Of certificate to bill of exceptions, see **APPEAL AND ERROR**, 20.

On appeal or writ of error, see **APPEAL AND ERROR**, 25-27.

Of constitution, see **CONSTITUTIONAL LAW**, 1.

Of complaint ground for continuance, see **CONTINUANCE**.

Of constitution or by-laws of beneficial association, see **INSURANCE**, 11.

ANIMALS:

1. **ANIMALS—PASTURAGE—ACTION ON CONTRACT—COMPLAINT.** A complaint states a cause of action for breach of contract to furnish sheep for pasturage, and not a cause of action for the sale of wheat, where it alleges that plaintiff in the month of July sold to the defendant the exclusive right of pasturing two thousand or more head of sheep upon the standing wheat on a certain section of land owned by plaintiff; that defendant agreed to immediately provide the sheep and pasture them until the wheat was fully consumed and pay therefor one-half cent per head of sheep per day; that the wheat was then in good condition for grazing and would have furnished pasturage for 2,000 sheep for ninety days; that defendant failed to furnish or pasture sheep upon the wheat until about four months later, when it grazed about 3,000 head of sheep upon the land for about one week's time, and that by reason thereof, plaintiff had been damaged in the sum of \$900. *Coleman v. Carstens Packing Co.* 179

APPEAL AND ERROR:

Costs on appeal, see **COSTS**.

Review in criminal prosecutions, see **CRIMINAL LAW**, 4, 5.

Assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 16-19.

Review of orders of public service commission, see **TELEGRAPHS AND TELEPHONES**, 1.

III. DECISIONS REVIEWABLE.

1. **APPEAL—APPEALABLE ORDERS—ORDER TO ASSESS STOCKHOLDERS.** An order of the court in a receivership proceeding, after notice to stockholders and their appearance in court, directing an assessment upon the stockholders and authorizing suit by the receiver in case of non-

APPEAL AND ERROR—CONTINUED.

payment, is appealable as a final order or judgment in a special proceeding, in which the receiver and the stockholders are adverse parties, and are finally concluded by the order. *Pacific Coast Coal Co. v. Esary*..... 448

2. APPEAL—DECISIONS APPEALABLE—CESSATION OF CONTROVERSY. An appeal from a temporary injunction, restraining the disposal of shares of stock pending the action, will be dismissed on the ground of cessation of the controversy, where subsequently the action was dismissed pursuant to a stipulation of the parties who had agreed to submit the matter to arbitration. *Eben v. Houser*..... 367

V. PRESERVATION AND RESERVATION IN LOWER COURT.

3. APPEAL AND ERROR—PRESERVATION OF GROUNDS—OBJECTIONS. Testimony of a pedestrian that, to one approaching a gulch in the night-time, the street had the appearance of a continuous one, cannot be urged on appeal as inadmissible, because the time of witness' observation was not fixed, where no objection was made in the court below. *Beach v. Seattle*..... 379
4. APPEAL AND ERROR—PRESERVATION OF GROUNDS. Errors alleged in the briefs but not disclosed by the record will not be considered on appeal. *Johnson v. Great Northern Lumber Co.*..... 16
5. APPEAL AND ERROR—PRESERVATION OF GROUNDS—NECESSITY OF EXCEPTIONS. Alleged error in the giving of instructions will not be reviewed on appeal where exceptions to such instructions are not presented by the statement of facts or bill of exceptions. *Harris v. Bremerton* 64
6. SAME—PRESERVATION OF GROUNDS—EXCEPTIONS—INSTRUCTIONS. Errors assigned in the giving of instructions will not be considered on appeal where the purported exceptions refer to instructions by number only, and there are no numbered instructions in the record. *Harris v. Bremerton*..... 64
7. APPEAL—EXCEPTIONS—NECESSITY—INSTRUCTIONS. In the absence of exceptions to the giving or refusal of instructions, it must be assumed on appeal that those given correctly stated the applicable law, and all of it. *Fogarty v. Northern Pac. R. Co.*..... 90

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

8. APPEAL—NOTICE OF APPEAL—PARTIES. On appeal from orders in garnishment proceedings in which the principal defendants have no interest, service of notice of appeal on the principal defendants is unnecessary. *Globe Electric Co. v. Montgomery*..... 452
9. APPEAL AND ERROR—NOTICE OF APPEAL—NOTICE BY CODEFENDANTS. A codefendant, similarly affected by the judgment, must join in the

APPEAL AND ERROR—CONTINUED.

appeal or take an independent appeal within ten days after notice of appeal, as required by Rem. & Bal. Code, § 1720. *Johnston v. Seattle Tazicab & Transfer Co.*..... 551

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

10. APPEAL—SUPERSEDEAS BOND—LIABILITY—CONDITION OF BOND. Under our statute permitting joint appeals, and prescribing but one form of supersedeas bond whether the appeals be joint or several, and providing that the supreme court on appeal may affirm, reverse or modify the judgment appealed from as to any or all of the parties, a surety on an appeal and supersedeas bond, is not released from liability to perform the judgment by a reversal of the judgment as to one of the appellants, where the bond was conditioned to bind the surety as to any judgment rendered against the appellants. *McFeron v. Fidelity & Deposit Co. of Maryland.*..... 303

11. APPEAL—SUPERSEDEAS BOND—LIABILITY—JUDGMENT—FINALITY—ALTERNATIVE CONDITIONS—REASONABLE TIME FOR ELECTION. In an action for rescission of a trade, a judgment setting aside a conveyance as fraudulent, and providing a condition by which the defendants could place themselves *in statu quo*, and as an alternative directing that judgment should go against them in a fixed sum and that execution could issue therefor, is not a conditional judgment, but is final, so as to fix the liability of sureties on a supersedeas bond, although no time was fixed for the exercise of defendants' option; since a reasonable time was implied. *McFeron v. Fidelity & Deposit Co. of Maryland.*..... 303

12. SAME—FINALITY—ALTERNATIVE CONDITIONS—APPEAL—LIABILITY OF SURETY. In such a case, refusal of the supreme court, on affirming the judgment, to direct judgment against the sureties on the supersedeas bond, does not affect the finality of the judgment, or prevent the liability of the surety from attaching, after the expiration of a reasonable time for defendants to comply with the conditions tendered in the judgment. *McFeron v. Fidelity & Deposit Co. of Maryland* 303

X. RECORD.

13. APPEAL AND ERROR—RECORD—STATEMENT OF FACTS. Where the evidence in a cause on appeal has not been brought up by bill of exceptions or statement of facts it will not be considered. *Speckert v. Speckert* 229
14. APPEAL AND ERROR—RECORD—STATEMENT OF FACTS—STIPULATION OF PARTIES. A purported stipulation of counsel that no statement of facts nor bill of exceptions need be filed is not established by the production of correspondence which indicates only that they endeavored to agree upon portions of the files to be included in the transcript, no reference being made to any statement of facts or bill of exceptions. *Speckert v. Speckert.*..... 229

APPEAL AND ERROR—CONTINUED.

15. **APPEAL AND ERROR—RECORD—AFFIDAVITS.** Affidavits incorporated in a transcript, but not made part of the record by statement of facts or bill of exceptions, will not be considered on appeal. *Speckert v. Speckert*..... 229
16. **APPEAL—RECORD—NECESSITY — GRANT OF NEW TRIAL.** Where a motion for a new trial, made on all the statutory grounds, was granted, and the record only shows the proceedings after verdict, the order must be affirmed on appeal, since the order may have been granted on other grounds which cannot be reviewed on the record brought up. *Quarring v. Stratton*..... 333
17. **APPEAL—RECORD—ABSTRACT—SUFFICIENCY.** An objection that the testimony set out in an abstract of the record is substantially a copy of that contained in the bill of exceptions without further condensation, is without merit, where in the preparation of the bill, giving the testimony in narrative form, all unnecessary matter was eliminated, and a further condensation would result in an incomplete presentation of the case. *Globe Electric Co. v. Montgomery*..... 452
18. **APPEAL AND ERROR—RECORD—ABSTRACT.** An appeal should be dismissed for want of a proper abstract of record, where the one offered is substantially a copy of the transcript without abbreviation or condensation, and fails to disclose that it had ever been filed in the superior court. *Speckert v. Speckert*..... 229
19. **APPEAL—ABSTRACTS—BRIEFS—TIME OF FILING.** An appeal will not be dismissed on the ground that appellants' abstract and brief were not filed within ninety days, as required by Rem. & Bal. Code, § 1730, where the time therefor has been extended by the failure of respondent to return the copy of the statement of facts served upon him; in view of Id., § 394, which provides that the time limited by law for the service and filing of the brief shall be enlarged by any delay in returning such copy to the extent of such delay. *Pacific Coast Coal Co. v. Esary*..... 448
20. **APPEAL—RECORD—CERTIFICATION—AMENDMENT.** The fact that the original certificate by the trial judge to the bill of exceptions did not meet the requirements of Rem. & Bal. Code, § 391, would not be ground for dismissal of the appeal, where an amended certificate which satisfies the statute was later filed and, by stipulation of the parties, the clerk of the supreme court was authorized to attach same to the bill of exceptions on file in the supreme court. *Globe Electric Co. v. Montgomery*..... 452
21. **APPEAL—RECORD — CERTIFICATE — IMPEACHMENT — REFERENCE.** In order to impeach the trial judge's certificate that a bill of exceptions contains all the material facts, the respondent's remedy is to apply to the supreme court for an order of reference to have the question determined. *Globe Electric Co. v. Montgomery*..... 452

APPEAL AND ERROR—CONTINUED.

XII. ASSIGNMENT OF ERRORS.

22. APPEAL AND ERROR—REVIEW—ASSIGNMENTS NOT BRIEFED. Errors assigned upon the admission and rejection of testimony, not urged in appellant's brief, will not be considered on appeal. *Gray v. Fuller* 13

XVI. REVIEW.

23. APPEAL AND ERROR—REVIEW—NEW TRIAL. The granting of a new trial in a cause tried by a jury, on the ground of insufficiency of the evidence, rests solely in the discretion of the trial court, which will be reviewed on appeal only for manifest abuse. *Independent Brewing Co. v. McOrimmon* 610
24. APPEAL—REVIEW—WAIVER OF ERROR—NONSUIT. Error in the denial of a motion for nonsuit is waived, where defendant presents his evidence, and the case will thereafter be reviewed on appeal upon the entire testimony. *Parker v. Washington Tug & Barge Co.* 575
25. APPEAL AND ERROR—REVIEW—AMENDMENT REGARDED AS MADE. In an action by the guardian of a person of unsound mind to set aside a deed of her separate property to her husband, the failure of the complaint to allege the grantee's knowledge of the grantor's insanity, when not demurred to, will be deemed amended to conform to evidence which indisputably showed knowledge of her mental condition on the grantee's part. *Stewart v. Stewart* 202
26. APPEAL AND ERROR — REVIEW — AMENDMENTS — PLEADING. Under Rem. & Bal. Code, § 1752, which requires the decision of a cause on appeal on its merits, disregarding technicalities, and considering amendments as made, the denial of a motion for nonsuit, in an action of libel, on the ground that the complaint did not allege the falsity of the publication, is not prejudicial, where the complaint negatived in terms every charge made in the publication and the answer averred the truth of the publication, thus supplying the alleged deficiencies. *Wilson v. Sun Publishing Co.* 503
27. APPEAL—REVIEW — PRESUMPTIONS — AMENDMENTS TO CONFORM TO PROOF. A complaint in an action on contract for the transportation of wheat in the fall of 1911, will, if necessary, be deemed amended on appeal to conform to the proof, admitted without objection, of a subsequent modification of the contract as construed and agreed to by the parties, for the transportation of the wheat in the spring of 1912. *Bridgeport Milling Co. v. Columbia & Okanogan Steamboat Co.* 336
28. APPEAL AND ERROR—PRESUMPTIONS—INSTRUCTIONS — CORRECTNESS. Where no question was raised as to the court's instructions, it will be assumed on appeal that, if the cause was one for the jury on the

APPEAL AND ERROR—CONTINUED.

- evidence, the instructions correctly stated the law and all of the law applicable. *Johnson v. Johnson*..... 18
29. APPEAL—DECISION—LAW OF THE CASE. Where an action for wrongful death was reversed on appeal merely on the ground of failure to segregate the damages accruing to various beneficiaries and an inadequate instruction on the measure of damages, on a second appeal on substantially the same evidence, issues as to the primary negligence of defendant and the contributory negligence of deceased upheld on the first appeal are foreclosed. *Fogarty v. Northern Pac. R. Co.*..... 90
30. APPEAL AND ERROR—LAW OF THE CASE. Questions decided adversely to appellant upon a first appeal will not be considered on a second appeal, where the evidence of existing conditions is the same as on the former trial. *Mosso v. Stanton Co.*..... 499
31. APPEAL—REVIEW—VERDICT—CONCLUSIVENESS. Where the evidence was conflicting, the supreme court on appeal will not set aside the verdict of the jury, especially after the refusal of the court who heard the evidence to grant a new trial thereon. *Fogarty v. Northern Pac. R. Co.*..... 90
32. APPEAL—REVIEW—VERDICT. Where the evidence of opposing litigants supports the material allegations of their respective pleadings, the verdict will not be reviewed on appeal. *Coleman v. Carstens Packing Co.*..... 179
33. APPEAL AND ERROR—VERDICT—CONCLUSIVENESS—AMOUNT OF DAMAGES. A verdict awarding damages will not be interfered with as excessive, when the question of amount was wholly within the province of the jury, and there was evidence to support the award. *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.*..... 395
34. APPEAL AND ERROR—REVIEW—FINDINGS BY COURT. The findings of a trial court, when not supported by a preponderance of the evidence, will be set aside on appeal. *Daugherty v. Metropolitan Motor Car Co.*..... 105
35. APPEAL—REVIEW—FINDINGS. Upon trials *de novo* on appeal, the findings of the lower court are not equivalent to the verdict of a jury and thus entitled to stand, if there is evidence to support them, but it is the duty of the supreme court not to follow them when against the weight of the evidence. *Lovell v. Haye*..... 109
36. APPEAL AND ERROR—QUESTIONS OF FACT—CONCLUSIVENESS. Where the evidence is conflicting, the findings of the lower court ought not to be disturbed on appeal, unless contrary to the preponderance of the evidence. *Burwell & Morford v. Barnes*..... 153
37. APPEAL AND ERROR—REVIEW—FINDINGS. Findings of the trial court will not be disturbed, where the evidence, though conflicting, clearly preponderates in favor of the findings. *Stewart v. Stewart*..... 202

APPEAL AND ERROR—CONTINUED.

38. **APPEAL—REVIEW—FINDINGS.** Findings upon directly conflicting evidence, where the court heard and saw the witnesses, will not be disturbed on appeal unless against the preponderance of the evidence. *Stanley v. Clough*..... 319
39. **APPEAL—REVIEW—FINDINGS.** Under Rem. & Bal. Code, § 1736, requiring a trial *de novo*, on appeal in actions legal or equitable tried to the court, the findings of the trial court are treated with respect, but will be set aside if the supreme court is convinced that they are against the preponderance of the evidence. *Lake Gravel Co. v. Williams Co.* 360
40. **APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT—FINDINGS.** Upon a trial *de novo* on appeal, it is the duty of the supreme court to carefully examine and weigh the conflicting evidence before the trial court, and to sustain or reverse the findings in accordance with the clear preponderance of the evidence. *Cornwall v. Anderson* 369
41. **APPEAL AND ERROR—REVIEW—FINDINGS.** The judgment of the trial court based on findings made on conflicting evidence is reversible on appeal, when the supreme court is satisfied that the preponderance of the evidence is against such findings. *Christensen v. Koch*.. 472
42. **APPEAL AND ERROR—REVIEW—FINDINGS.** Where there is substantial evidence to support the verdict, the finding of a jury upon a disputed question of fact will not be disturbed on appeal. *Parker v. Washington Tug & Barge Co.*..... 575
43. **APPEAL—HARMLESS ERROR—BILL OF EXCEPTIONS—OMISSIONS.** The omission from a bill of exceptions of interrogatories to garnishee defendants prior to trial and their answers thereto could not be assigned as error, where the bill of exceptions did not show that they had been offered in evidence. *Globe Electric Co. v. Montgomery* 452
44. **APPEAL—REVIEW—HARMLESS ERROR—WAIVER.** Where, in an action for personal injuries, the court, in withdrawing from the jury the question of damages as to certain injuries not included in the complaint, failed to mention one of the items omitted, the omission was not prejudicial error, where counsel stated that the withdrawal was sufficient and failed to request instruction on the point, and the verdict was not excessive. *Beach v. Seattle*..... 379
45. **APPEAL AND ERROR—REVIEW—HARMLESS ERROR.** In an action to have a deed adjudged to be a mortgage, to which the defendants answered that the deed was absolute and not intended as a mortgage, error of the court in failing to so find, and entering a decree of foreclosure cannot be reversed on plaintiff's appeal, where defendant filed no cross-appeal and accepted the decree of foreclosure; since the error was prejudicial to defendants and not to plaintiffs. *Nutter v. Cowley Investment Co.*..... 207
46. **APPEAL—HARMLESS ERROR—REFUSAL OF CONTINUANCE.** Under Rem. & Bal. Code, § 297, providing that new matter in a reply shall

APPEAL AND ERROR—CONTINUED.

- be deemed controverted without further pleading addressed thereto, the refusal of the court to grant a continuance to enable defendants to reply to new matter set up in the plaintiffs' amended reply, filed a few days before the case was set down for trial, was not prejudicial error, where the defense thereto was gone into fully at the trial. *Margett v. Wilson*..... 98
47. SAME—CONDUCT OF TRIAL—ARGUMENT OF COUNSEL. Misconduct of counsel in argument to the jury is not prejudicial error, where the trial court cautions the jury to decide the issues upon the evidence and not upon the statements of counsel. *Rohwoeder v. Titus*.... 441
48. APPEAL AND ERROR—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE. A reversal will not be ordered for error in the failure of the court to strike testimony which was clearly a conclusion of the witness, where such failure was not prejudicial. *Holmes v. Strong* 7
49. APPEAL—HARMLESS ERROR—PREJUDICIAL TO RESPONDENT. Error prejudicial to respondent in the admission and exclusion of evidence cannot be taken advantage of by appellant. *Rohwoeder v. Titus*. 441
50. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE. Testimony of an attorney as to what one of the parties testified to in another case would not be prejudicial error when the same fact is shown by other evidence. *Peterson v. Tull*..... 546
51. APPEAL AND ERROR—HARMLESS ERROR—EXCLUSION OF EVIDENCE. In an action on a fire insurance policy for a loss of wheat in a warehouse, in which the defense was that the plaintiff had procured the burning of the warehouse, the exclusion of evidence of the incendiary burning of another warehouse in which plaintiff had insured wheat in storage, and of the plaintiff's financial condition, is harmless, where there was no other substantial evidence of the incendiary origin of the fire; since the excluded evidence was insufficient to sustain the defense. *Goddard v. Northwestern Mutual Fire Association* 585
52. APPEAL—HARMLESS ERROR—REQUESTED INSTRUCTIONS. Refusal to give requested instructions is not prejudicial error when they were given in substance in other instructions, in so far as the facts of the case call for instructions upon the matters requested. *Harris v. Bremerton* 64
53. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Length of instructions, or repetition of matters contained therein, are not necessarily matters of prejudice, but the party complaining should show specifically in what way he is prejudiced thereby. *Mosso v. Stanton Co.* 499
54. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Refusal of requested instructions is not prejudicial when the instructions given correctly state the law applicable to the facts in the case. *Parker v. Washington Tug & Barge Co.*..... 575

APPEAL AND ERROR—CONTINUED.**XVII. DETERMINATION AND DISPOSITION OF CAUSE.**

55. **APPEAL—DECISION — JUDGMENT — CONSTRUCTION.** The decision of the supreme court, is to be construed according to its necessary legal effect as applied to the parties, privies and matters before the court, rather than according to its liberal terms; and hence recitals on reversal broad enough to include parties to the action not appealing will be restricted in operation to those parties only who appealed. *In re West Wheeler Street*..... 146

APPEARANCE:

1. **APPEARANCE—DEMURRER OPERATING AS.** Where a defendant files a demurrer after the time for appearance has expired, but before any rule has been entered against him, the filing of the demurrer constitutes an appearance, and hence leave of court therefor would be unnecessary. *State ex rel. Hannebohl v. Superior Court*..... 663

APPOINTMENT:

Of guardian, see **INSANE PERSONS**.

APPROPRIATION:

Of property for public use, see **EMINENT DOMAIN**.

Appropriation measures subject to referendum, see **STATUTES**, 2-6.

Regulation of telephone companies as taking of property without compensation, see **TELEGRAPHS AND TELEPHONES**, 4.

APPROVAL:

Of construction work by architect, see **CONTRACTS**, 1.

ARBITRATION AND AWARD:

Abandonment of contract as affecting duty to submit dispute to arbitration, see **EXCHANGE OF PROPERTY**, 3.

ARCHITECTS:

Approval of work under contract, see **CONTRACTS**.

ARGUMENT OF COUNSEL:

As harmless error, see **APPEAL AND ERROR**, 47.

In criminal prosecutions, see **CRIMINAL LAW**, 4.

In civil actions, see **TRIAL**, 1.

ASSAULT AND BATTERY:

Declarations of defendant as evidence, see **CRIMINAL LAW**, 2.

Assault with intent to rape, see **RAPE**.

Cross-examination in prosecution for assault, see **WITNESSES**, 2.

1. **ASSAULT AND BATTERY — CRIMINAL PROSECUTION — DEGREES — INSTRUCTIONS.** In a prosecution for assault in the second degree, under which the defendant might be convicted of assault in the third degree, defined as any assault not included in first and second degree

ASSAULT AND BATTERY—CONTINUED.

assaults, an instruction defining all the degrees of assault, but expressly charging the jury that "defendant is not charged with assault in the first degree, and a definition of that offense is only given you that you may better understand the other degrees," was not prejudicial error. *State v. Ross*..... 218

2. **SAME—SECOND DEGREE—EVIDENCE—SUFFICIENCY.** A conviction of assault in the second degree is warranted, under Rem. & Bal. Code, § 2414, defining the offense as willfully inflicting grievous bodily harm upon another with or without a weapon, or as assaulting with a weapon or thing likely to produce bodily harm, where the evidence showed that defendant disarmed the prosecuting witness of his revolver, struck him across the jaw with something that felt like a slug of iron, that he had a cut under each eye which were swollen almost shut, that his jaw was severely swollen, and that there was a fracture of the nasal bone. *State v. Ross*..... 218

ASSESSMENT:

Liability of stockholders to assessment on stock, see **CORPORATIONS**, 9.
Increase of assessment rate by fraternal benefit society, see **INSURANCE**, 4-13.

Of expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 7-19.

Of tax, see **TAXATION**.

ASSESSMENT WORK:

On mining claim, see **MINES AND MINERALS**, 1, 3.

ASSIGNMENT OF ERRORS:

See **APPEAL AND ERROR**, 22.

ASSIGNMENTS:

Corporate bonds, see **CORPORATIONS**, 5.

Cancellation of assignment of patent, for fraud, see **PATENTS**.

Of conditional sales contract, see **SALES**, 7.

Rights of assignees to subrogation, see **SUBROGATION**, 2, 3.

1. **ASSIGNMENTS—ACTION—DEFENSES—PAYMENT TO ANOTHER.** In an assignee's action for the price of lumber sold by the assignor to defendant, it is no defense that defendant had orally promised to protect a third party who had supplied the lumber to plaintiff's assignor, and had paid such third party therefor, where such promise was void under the statute of frauds, and such payment was made after notice of the assignment. *First National Bank v. Geske & Co.* 477

ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Assignment of corporate bonds to holder of trust deed, for temporary advances, as assignment for benefit of creditors, see **CORPORATIONS**, 5.

ASSOCIATIONS:

Mutual benefit insurance associations, see **INSURANCE**, 3-13.

ASSUMPTION:

Of risk by employee, see **MASTER AND SERVANT**, 1.

ATTORNEY AND CLIENT:

Argument of counsel as harmless error, see **APPEAL AND ERROR**, 47.

Argument and conduct of counsel at trial in criminal prosecution, see **CRIMINAL LAW**, 4.

Opening statement of counsel, see **PLEADING**, 1.

Personal liability of receiver for counsel fees, see **RECEIVERS**.

Argument and conduct of counsel at trial in civil actions, see **TRIAL**, 1.

1. **ATTORNEY AND CLIENT—PARTNERSHIP—CONTRACT FOR DISSOLUTION—ACCOUNTING—FEES.** Where a contract dissolving a law partnership and arranging a division of the business on hand, and of the fees and commissions thereafter arising from such business, enumerated certain business, including among others a specified case in which the compensation was to be a percentage of the recovery, and provided that the fees and allowances arising therefrom, except commissions on collections, shall be divided in certain proportions, must be construed as intending that in the specified case the compensation was regarded as "fees" for division, and not as "commissions" which by the contract were reserved to one of the partners as his own "fees," the element of contingency in the fee not rendering it subject to classification as a "commission." *Gray v. Stern* 645
2. **ATTORNEY AND CLIENT—PARTNERSHIP—CONTRACT OF DISSOLUTION—PERFORMANCE.** Under a contract of dissolution of partnership in the law business, wherein the retiring partner was to complete certain business in the circuit court of appeals at his own expense, in order to be entitled to an agreed share of compensation, the fact that such retiring partner was put to no further expense in the matter, and did no other work in the case, after writing the brief thereon, than make an arrangement for another attorney to argue the cause in the circuit court of appeals, would not deprive him or his estate of his share of compensation. *Gray v. Stern*..... 645
3. **ATTORNEY AND CLIENT—PARTNERSHIP—CONTRACT OF DISSOLUTION—PERFORMANCE.** In such a case, the fact that the brief was originally written during the existence of the partnership, would not make it the property of the continuing partner on the dissolution, so as to make its use, subsequent to the death of the retiring partner, the contribution of the continuing partner to work necessary in the cause. *Gray v. Stern*..... 645
4. **ATTORNEY AND CLIENT—PARTNERSHIP—DISSOLUTION—ACCOUNTING—INDIVIDUAL PROFIT.** The continuing partner who, under a dissolu-

ATTORNEY AND CLIENT—CONTINUED.

tion contract, was to account to the retiring partner for a proportionate part of the fees on certain business, would not be required to divide the profit on buying the client's claim at a discount. *Gray v. Stern* 645

AUTOMOBILES:

Injury to passenger from defective street, see MUNICIPAL CORPORATIONS, 20.
Collision with in city street, see MUNICIPAL CORPORATIONS, 21-23, 26, 27, 29, 31.
Law regulating operation of jitney buses, see STATUTES, 11-13.

AWARD:

Of costs to unsuccessful party, on appeal in equity suit, see COSTS.
Of temporary maintenance and suit money pending action for separate maintenance, see HUSBAND AND WIFE, 2.

BANKS AND BANKING:

Taxation of banks and bank stock, see TAXATION, 3.

BAR:

Of action by limitation, see JUDGMENT; LIMITATION OF ACTIONS.

BENEFICIAL ASSOCIATIONS:

Mutual benefit insurance associations, see INSURANCE, 3-13.

BENEFITS:

To property from improvement, see MUNICIPAL CORPORATIONS, 8, 10, 12.

BILL OF EXCEPTIONS:

As part of record on appeal, see APPEAL AND ERROR, 5, 13, 14, 20, 21.

BILLS AND NOTES:

Parol evidence to modify or contradict note, see EVIDENCE, 2.
Payment of premium by promissory note, see INSURANCE, 1.

1. **BILLS AND NOTES—DURESS—WHAT CONSTITUTES.** The obtaining of promissory notes by threats of litigation and of criminal prosecution would not constitute legal duress, where the threats were merely of prosecution at some indefinite time, and there was no restraint imminent at the time of signing the notes that could be considered as constraining the mind of an ordinary person. *Cornwall v. Anderson* 369
2. **BILLS AND NOTES—DURESS—SUFFICIENCY OF EVIDENCE.** Duress sufficient to coerce defendants into the execution of promissory notes is not established by evidence that defendants were men in the prime of life, of business experience and mentally competent, that the negotiations were under way for some time after plaintiffs had

BILLS AND NOTES—CONTINUED.

threatened a receivership and a criminal prosecution, and defendants never sought legal advice, and the notes were not repudiated until about due date, six and one-half months later; the controlling test being the condition of the mind of the wronged party at the time, his state of health, condition in life, experience, education and intelligence. *Cornwall v. Anderson*..... 369

3. **BILLS AND NOTES—HOLDER IN DUE COURSE—ANTECEDENT DEBT—STATUTE.** The holder of a bank check as collateral in part for an antecedent debt, is a "holder in due course" under the negotiable instruments act (Rem. & Bal. Code, §§ 3415-3418) providing that every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, that an antecedent or preexisting debt constitutes value, and that, where a holder has a lien on the instrument he is deemed a holder for value to the extent of his lien. *German American Bank of Seattle v. Wright*..... 460
4. **SAME—HOLDER IN DUE COURSE—STALE CHECK—RIGHTS OF HOLDER—STATUTE.** Under Rem. & Bal. Code, § 3576, requiring a check to be presented for payment within a reasonable time or the drawer will be discharged "to the extent of the loss caused by the delay," the taker of a stale check, although not an unqualified holder in due course, would be such holder, except in so far as the drawer of the check could show that he had been injured by the delay. *German American Bank of Seattle v. Wright*..... 460
5. **SAME—HOLDER IN DUE COURSE—EXECUTORY CONTRACT—CONSIDERATION—NOTICE.** Knowledge by an indorser of a bank check that it had been given in consideration of an executory contract of the payee would not deprive the indorsee of his character of a *bona fide* holder in due course, where, at the time of the transfer, there had been no failure of consideration through failure of the payee to perform the contract for which the check was given. *German American Bank of Seattle v. Wright*..... 460
6. **SAME—HOLDER IN DUE COURSE—CHECK AS COLLATERAL—BURDEN OF PROOF.** In an action on a bank check which had been pledged as collateral security, the burden would not be upon the pledgee as indorsee to show that it was a holder in due course, unless the title of the payee was defective by reason of fraud, duress, or other unlawful means, or because of an illegal consideration. *German American Bank of Seattle v. Wright*..... 460
7. **SAME—HOLDER IN DUE COURSE OF PLEDGED CHECK—EXHAUSTION OF SECURITIES.** No principle of suretyship which would require a bank to exhaust other security before enforcing a check is involved in a transaction whereby a check is indorsed to a bank as collateral security for an antecedent debt of the indorser. *German American Bank of Seattle v. Wright*..... 460

BILLS AND NOTES—CONTINUED.

8. **BILLS AND NOTES—BONA FIDE PURCHASERS—DEFENSES AVAILABLE—THEFT BEFORE DELIVERY.** A holder in due course of commercial paper may recover thereon, although the instrument was originally stolen from the maker thereof; in view of Rem. & Bal. Code, § 3407, which provides that where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed; this, under the maxim that, where one of two innocent persons must suffer by the wrong of another, he whose act made the loss possible must suffer. *Angus v. Downs*..... 75

9. **BILLS AND NOTES—NEGOTIATION OF CHECK—BONA FIDE HOLDER—SECRET AGREEMENT.** Where a negotiable check is given without anything indicating it was not to be negotiated, such as post-dating or other device, the maker cannot, after its negotiation by the payee, relieve himself of liability by setting up a secret agreement with the payee whereby the check was not to be cashed or negotiated, except under certain contingencies. *German American Bank of Seattle v. Wright*..... 460

10. **BILLS AND NOTES—INDORSEMENT—CONSIDERATION.** Under Rem. & Bal. Code, § 3415, providing that every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value, the burden is upon an accommodation indorser to show that the indorsement was without consideration to him or to the makers. *State Bank of Clarkston v. Morrison*.... 182

11. **BILLS AND NOTES—ACTIONS—SUFFICIENCY OF EVIDENCE—CONSIDERATION FOR INDORSEMENT.** In an action on a promissory note, consideration for a guarantee by an accommodation indorser, is sufficiently shown, where there was evidence that the bank examiner was requiring payment or securing of four certain notes held by the bank, all executed by the same makers; that the president of the bank entered into an agreement with defendant, who was interested with the makers and had previously accommodated them, not to bring suit on the note if the latter would guarantee the note in controversy; that defendant did guarantee the note in consideration that suit should not be immediately brought thereon; and paid interest and acknowledged his personal liability thereon; and that, as part of the same transaction, the president of the bank had himself taken up the three other notes so that suit might not be brought thereon. *State Bank of Clarkston v. Morrison*..... 182

12. **BILLS AND NOTES—ACTIONS—DEFENSES—HOLDER IN DUE COURSE—NOTICE OF FRAUD.** In an action on promissory notes, the answer sufficiently sets up an affirmative defense of fraud, and that plaintiff was not a holder in due course, where it alleged that the notes had been given to enable the payee to purchase stock on the representa-

BILLS AND NOTES—CONTINUED.

- tions of the payee that he could sell at an advance, that the stock was at all times valueless, and that plaintiff introduced the payee to defendants, and had knowledge of the fraud, the whole proposition being a scheme and conspiracy to obtain possession of the notes. *Guinn v. Ford* 571
13. SAME—PLEADING—ALLEGATION OF CONDITIONAL DELIVERY—SUFFICIENCY. In an action on a promissory note, an answer setting up that it was distinctly agreed by and between the makers and payee that the note was to be used for the purpose of raising the necessary money to finance a certain transaction, and purchase certain stock, negatives a conditional delivery of the note, such as would enable the makers to show by parol that it was to become a binding agreement only upon the happening of a certain contingency. *Guinn v. Ford* 571
14. BILLS AND NOTES—ACTIONS—PLEADING AND PROOF—VARIANCE. In an action to recover upon a bank check, in which the complaint tendered an issue of the unqualified ownership of the check and the answer pleaded that the check was held as collateral only, the quality of plaintiff's possession, as the real issue, was presented by the pleadings, the answer supplying what the complaint lacked; hence evidence sustaining the answer instead of the complaint cannot be urged as a variance amounting to failure of proof, under Rem. & Bal. Code, § 1752, requiring courts to decide cases on their merits, disregarding all technicalities and considering all amendments which could have been made as made. *German American Bank of Seattle v. Wright* 460
15. SAME—ACTIONS—EVIDENCE—COLLECTION OF CHECK—CUSTOM. The rejection of expert testimony that it was not customary or in keeping with prudent banking to hold a check taken as collateral for a period of twenty days before "sending it through" for collection, was not error, the material thing being injury to the maker, and this was not shown by the evidence. *German American Bank of Seattle v. Wright*..... 460
16. BILLS AND NOTES—ACTIONS—QUESTIONS FOR JURY. In an action upon a promissory note, a directed verdict for plaintiff was proper, where she testified that she had paid value for the note without notice of any kind that defendant disputed his liability thereon, which testimony was corroborated by circumstances surrounding the transaction and by other witnesses; and there was no offer to combat plaintiff's evidence that she was a holder in good faith. *Angus v. Downs* 75
17. BILLS AND NOTES—ACTIONS—QUESTION FOR JURY—HOLDER IN DUE COURSE. In an action on a promissory note, whether plaintiff was a holder in due course is a question for the jury, where his claim depended upon the credibility of his testimony, which was disputed by the circumstances, such as his purchase of the note without in-

BILLS AND NOTES—CONTINUED.

quiry into the solvency of the maker or calling upon him personally, and uncertainty in his testimony as to whether the check given by him to the payee of the note was for the note or some other business transaction. *Rohweder v. Titus*..... 441

BLASTING:

Personal injuries from, see **EXPLOSIVES**.

BONA FIDE PURCHASER:

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 3-9, 12, 16, 17.

Of property fraudulently conveyed, see **FRAUDULENT CONVEYANCES**, 3-5, 7.

Of lands, see **VENDOR AND PURCHASER**, 4.

BONDS:

Supersedeas on appeal, see **APPEAL AND ERROR**, 10-12.

Corporate bonds, see **CORPORATIONS**, 4, 5.

Contractor's bonds, see **MUNICIPAL CORPORATIONS**, 1.

BREACH:

Of contract to furnish sheep for pasturage, see **ANIMALS**.

Of contract for carriage of goods, see **CARRIERS**.

Of contract, see **EXCHANGE OF PROPERTY**, 2, 3.

Of contract rights of certificate holder, by increase of assessment rates by fraternal benefit society, see **INSURANCE**, 4, 5, 8, 13.

BRIEFS:

On appeal, see **APPEAL AND ERROR**, 4, 19, 22.

BUILDING CONTRACTS:

See **CONTRACTS**.

BULK STOCK LAWS:

Sale of stock in bulk, see **FRAUDULENT CONVEYANCES**, 2.

BURDEN OF PROOF:

To show holder of check in due course, see **BILLS AND NOTES**, 6.

To show want of consideration for indorsement of note, see **BILLS AND NOTES**, 10.

To show location as "fairway," see **COLLISION**.

Negligence in setting off blast, see **EXPLOSIVES**, 4, 5.

Malice in prosecution of action, see **MALICIOUS PROSECUTION**, 2.

To show unequal assessment, see **MUNICIPAL CORPORATIONS**, 12.

To show variance, see **PLEADING**, 2.

To show absence of negligence of bailee in possession of scow, see **SHIPPING**, 2.

To show necessity and reasonableness of order of public service commission, see **TELEGRAPHS AND TELEPHONES**, 2.

To rebut presumption of negligence, instructions, see **TRIAL**, 8.

BY-LAWS:

Of benefit insurance company, amendment of, see **INSURANCE**, 11.

CANCELLATION OF INSTRUMENTS:

Rescission of contract, see **EXCHANGE OF PROPERTY**, 4, 5.

Setting aside fraudulent conveyances, see **FRAUDULENT CONVEYANCES**.

Rescission of contract by member of fraternal benefit society, see **INSURANCE**, 13.

Rescission of assignment of patent, see **PATENTS**.

Rescission of contract of sale, see **SALES**, 2, 3.

Rescission of contracts for sale of land, see **VENDOR AND PURCHASER**, 1-3.

CAPITAL:

Of corporations in general, see **CORPORATIONS**, 1, 2.

CARRIERS:

Law regulating motor vehicles, time of taking effect, see **STATUTES**, 11.

1. **CARRIERS—CONTRACTS — BREACH — DELAY — DAMAGES — DEFENSES.**

Liability for damages for unreasonable delay by a steamboat company in transporting wheat down the river pursuant to its contract with plaintiff, whereby plaintiff lost an advantageous sale of the wheat to a milling company, cannot be avoided by the steamboat company on the claim that plaintiff's contract with the milling company was an absolute sale at the point up the river where the wheat was located, where in fact the sale was dependent on the transportation of the wheat, and was rescinded by the milling company for failure to transport and deliver the wheat. *Bridgeport Milling Co. v. Columbia & Okanogan Steamboat Co.*..... 336

CERTAINTY:

Of information, see **MALICIOUS PROSECUTION**, 1.

CERTIFICATE:

Of acknowledgment of written instrument, see **ACKNOWLEDGMENT**.

Of judge to bill of exceptions, see **APPEAL AND ERROR**, 20, 21.

Of membership in fraternal beneficiary society, see **INSURANCE**, 3-13.

CESSATION OF CONTROVERSY:

On appeal, see **APPEAL AND ERROR**, 2.

CHALLENGE:

To juror, see **JURY**, 2.

CHANGE:

Of street grade as taking and damaging of property, see **CONSTITUTIONAL LAW**, 7.

Of street grade, see **MUNICIPAL CORPORATIONS**, 2.

Of street grade obstructing water course, see **WATERS AND WATER COURSES**.

CHANGE OF VENUE:

Of civil actions, see **VENUE**.

CHARACTER:

Evidence as to character in civil actions, see **EVIDENCE**, 1.

CHARGE:

To jury in criminal prosecutions, see **CRIMINAL LAW**, 5.

To jury in civil actions, see **TRIAL**, 7-13.

CHARTER PARTIES:

See **SHIPPING**, 1.

CHattel MORTGAGES:

1. **CHattel MORTGAGES—RECORD—NOTICE.** A chattel mortgage of record in the proper registration office, and unsatisfied of record, is constructive notice to those subsequently becoming interested in the property, that the debt secured thereby has not been wholly paid. *University State Bank v. Steeves*..... 55

CHECKS:

See **BILLS AND NOTES**, 3-7, 9, 14, 15.

CHILD:

See **ADOPTION**.

Injury from explosion of dynamite cap, see **EXPLOSIVES**, 1-3.

CHOSE IN ACTION:

As property of ward warranting appointment of guardian, see **INSANE PERSONS**, 3.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CITIZENS:

Equal protection of laws, see **CONSTITUTIONAL LAW**, 4.

CLAIMS:

Against estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 2.

Mining claims, see **MINES AND MINERALS**.

CLASS LEGISLATION:

See **CONSTITUTIONAL LAW**, 4.

CLEAN HANDS:

Coming into court with clean hands, see **EQUITY**.

COLLATERAL ATTACK:

On appointment of guardian, see **INSANE PERSONS**, 4.

On orders of public service commission, see **TELEGRAPHS AND TELEPHONES**, 1.

COLLATERAL UNDERTAKING:

See FRAUDS, STATUTE OF, 1.

COLLECTION:

Of check, evidence of custom, see BILLS AND NOTES, 15.

COLLISION:

With automobile in city street, see MUNICIPAL CORPORATIONS, 21-23.
26, 27, 29, 31.

Between street car and automobile, see STREET RAILROADS.

1. COLLISION—SUIT FOR DAMAGES—FAIRWAY—BURDEN OF PROOF.
The middle of an arm of Puget Sound, four miles wide and navigable for large vessels its entire width, is not, as a matter of law, a "fairway," within the act of Congress (2 Fed. Stat. Ann. 163) prohibiting "to any vessel or boat engaged in fishing the right of obstructing a fairway used by vessels other than fishing vessels or boats;" and upon the defense of the statute, in an action for colliding with a fishing boat therein, the burden is upon the defendant to show that the location was a "fairway." *Johnnsson v. American Tug Boat Co.*..... 212
2. COLLISION—SUIT FOR DAMAGES—DEFENSES—FAULT AS CAUSE OF COLLISION. Carrying on the occupation of fishing without having obtained a license, in compliance with the fishing regulations of the state, is not a defense to an action for damages for injuries to a fishing boat and nets sustained in a collision in navigable waters, as there was no causal connection between the neglect to obtain a license and the collision. *Johnnsson v. American Tug Boat Co.* 212

COLOR OF TITLE:

Possession under claim of right and color of title, see FORCIBLE ENTRY AND DETAINER.

COMMERCE:

Carriage of goods and passengers, see CARRIERS; SHIPPING.

COMMUNITY PROPERTY:

Liability of, see HUSBAND AND WIFE, 1.

COMPENSATION:

Of attorney, see ATTORNEY AND CLIENT, 1, 2, 4.

For property taken or damaged for public use, see EMINENT DOMAIN.

Personal liability of receiver for attorney's fees, see RECEIVERS.

Of teachers, see SCHOOLS AND SCHOOL DISTRICTS.

Requiring physical connection of telephone companies as taking of property without compensation, see TELEGRAPHS AND TELEPHONES, 4.

COMPETENCY:

Of witnesses in general, see **WITNESSES**, 1.

COMPETITION:

Unfair use of similar label for like article of goods, see **TRADE-MARKS AND TRADE-NAMES**.

COMPLAINT:

In civil actions, see **PLEADING**, 1.

CONDEMNATION:

Taking or damaging property for public use, see **EMINENT DOMAIN**.

CONDITIONAL SALES:

See **SALES**, 7.

CONDUCT:

Of counsel as harmless error, see **APPEAL AND ERROR**, 47.

Of counsel at trial of civil action, see **TRIAL**, 1.

CONSENT:

Of parent to adoption of child, see **ADOPTION**, 1.

CONSIDERATION:

For check or promissory note, see **BILLS AND NOTES**, 5, 10, 11.

Of fraudulent conveyance, see **FRAUDULENT CONVEYANCES**, 3-5.

For assignment of patent, see **PATENTS**, 2.

CONSTITUTIONAL LAW:

Enactment and validity of statutes, see **STATUTES**.

Uniform rate of taxation, see **TAXATION**, 1, 3.

Order requiring physical connection of telephone companies as taking of property without compensation, see **TELEGRAPHS AND TELEPHONES**, 4.

1. **CONSTITUTIONAL LAW — CONSTRUCTION OF CONSTITUTIONAL PROVISIONS.** In ascertaining the intent in adopting an amendment to the constitution providing for the referendum on new laws, courts may resort to the history of such legislation, the contemporaneous construction, the changes made, the context and subject-matter, and the purpose and spirit of the act and the form in which the idea has been fashioned in other states. *State ex rel. Blakeslee v. Clausen*. 260
2. **CONSTITUTIONAL LAW—POLICE POWER—JUDICIAL QUESTION.** Whether a given law is in reality a proper exercise of the police power is ultimately a judicial, not a legislative, question; and the necessity for a judicial check upon the exercise of the police power is not changed by the mere fact that certain phases of the power are

CONSTITUTIONAL LAW—CONTINUED.

- selected and made an exception to a new constitutional guaranty. *State ex rel. Case v. Howell*..... 281
3. CONSTITUTIONAL LAW—POLICE POWER—VALIDITY OF ACT—PRESUMPTIONS. When the propriety of an exercise of the police power is called in question, every presumption should be indulged in favor of the constitutionality of the legislation. *State ex rel. Case v. Howell* 281
4. CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAW—CLASSIFICATION. The legislature may, as an exercise of the police power, enact laws which do in fact discriminate between citizens or classes of citizens, whenever the given legislation bears a reasonable relation to the preservation of the public peace, health, safety, or to the promotion of general welfare, since the constitutional prohibition against enactments denying equal protection of the laws to any citizen is no more vital and mandatory than the essential attribute of government to make laws protecting and promoting the general welfare. *State ex rel. Case v. Howell*..... 281
5. CONSTITUTIONAL LAW—LIENS—CONDITIONAL SALE CONTRACTS—MECHANICS' LIENS—PRIORITIES—STATUTES. Rem. & Bal. Code, § 1156, which provides that "every person who is in possession of a chattel, under an agreement for the purchase thereof, whether the title thereto be in him, or his vendor, shall for the purposes of this act [Id., § 1154], be deemed the owner thereof, and the lien of a person expending material, labor or skill thereon shall be superior to and preferred to the rights of the person holding the title thereto," is not unconstitutional as preferring mechanics' liens over the interest of the vendor under a conditional sale contract, nor as being a deprivation of one's property without due process of law. *Crosier v. Cudihee* 237
6. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—ACTIONS. One who is in court seeking to enforce the validity of his vendor's lien as against a mechanics' lien is not in a position to urge that he has been deprived of his property without due process of law. *Crosier v. Cudihee* 237
7. CONSTITUTIONAL LAW—DUE PROCESS—CHANGE OF STREET GRADE—DAMAGING PRIVATE PROPERTY. An injury to an abutting property caused by a change in the grade of a highway, made necessary to carry the highway across the tracks of a railroad, is a taking and damaging of property within the meaning of the constitutional provision (Const., art. 1, § 16) relating to the taking and damaging of private property for a public use, even though the change is confined to the highway and does not extend to the property damaged. *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.*..... 395

CONSTRUCTION:

- See **LIMITATION OF ACTIONS.**
- Of decision on appeal, see **APPEAL AND ERROR**, 55.
- Of contract for dissolution of partnership, see **ATTORNEY AND CLIENT**, 1.
- Of constitutional provisions, see **CONSTITUTIONAL LAW**, 1.
- Of statute requiring notice to owner of materials furnished for building, see **MECHANICS' LIENS**, 2.
- Of statutes relating to public improvements, see **MUNICIPAL CORPORATIONS**, 3.
- Of statutes, see **STATUTES.**
- Of statute providing method of assessing bank stock, see **TAXATION**, 3.
- Of judgment as finding, see **TRIAL**, 6.
- Of instructions as a whole, see **TRIAL**, 12, 13.

CONTINUANCE:

Harmless error in refusal of, see **APPEAL AND ERROR**, 46.

1. **CONTINUANCE—GROUNDS—TRIAL AMENDMENT.** A motion for continuance on granting leave to plaintiff to amend his complaint during the trial was properly denied, where the amendment presented no new issue. *Wilson v. Sun Publishing Co.*..... 503

CONTRACTORS:

- Independent contractors, see **MASTER AND SERVANT**, 5, 6.
- Bond of contractor on public work, see **MUNICIPAL CORPORATIONS**, 1.

CONTRACTS:

- See **BILLS AND NOTES**; **CORPORATIONS**, 3; **INSURANCE**; **SALES.**
- To furnish sheep for pasturage, see **ANIMALS.**
- For dissolution of partnership, see **ATTORNEY AND CLIENT.**
- Carriage of goods, see **CARRIERS.**
- For exchange of property, see **EXCHANGE OF PROPERTY.**
- Agreements within statute of frauds, see **FRAUDS, STATUTE OF.**
- For public improvements, see **MUNICIPAL CORPORATIONS**, 1.
- For services as teacher, see **SCHOOLS AND SCHOOL DISTRICTS.**
- Charter parties, see **SHIPPING**, 1.
- Sales of realty, see **VENDOR AND PURCHASER.**

1. **CONTRACTS—BUILDING CONTRACTS—APPROVAL OF ARCHITECT.** Where construction work is to be done to the satisfaction of a third party, such as an architect, the judgment of such third party, either in approving or condemning the work, must be exercised in an honest and independent manner, not arbitrarily or fraudulently; and, if the approval or condemnation of the work is arbitrary, it amounts to a constructive fraud. *Taft v. Whitney Co.*..... 389
2. **CONTRACTS—PERFORMANCE—EVIDENCE.** In an action by a subcontractor to recover for work done which the architects condemned and ordered replaced by the principal contractor, evidence touching the

CONTRACTS—CONTINUED.

question whether the floors constructed by the subcontractor were equally as good as those subsequently constructed by the principal contractor to replace them was admissible as bearing on the question whether the architects had considered the merits of the subcontractor's work when they ordered its removal, or whether the reason they condemned it was because the contract had not been submitted to them for their approval. *Taft v. Whitney Co.*.... 389

3. **CONTRACTS—PERFORMANCE—QUESTION FOR JURY.** In an action by a subcontractor on a contract for putting in the cement floors of a large office building, whether the architects had been arbitrary in condemning the work and ordering its removal, and whether the work done by the subcontractor was in conformity to the plans and specifications, was a question for the jury, where the evidence showed he had completed the work on five of the floors, and the architects ordered them all out on the objection that they did not conform to sample and that the subcontractor had been employed without their approval, as the contract with the construction company required; and the subcontractor testified that whatever defects there were in the floors could have been corrected without their removal. *Taft v. Whitney Co.* 389

CONTRIBUTORY NEGLIGENCE:

See **NEGLIGENCE**.

Of traveler injured on highway, see **HIGHWAYS**, 4.

Of person injured on street, see **MUNICIPAL CORPORATIONS**, 26-29.

CONVEYANCES:

See **CHATTEL MORTGAGES**; **MORTGAGES**.

To or by corporation, see **CORPORATIONS**, 4, 5.

In fraud of creditors, see **EXECUTORS AND ADMINISTRATORS**, 1; **FRAUDULENT CONVEYANCES**.

Subsequent record of, see **LIS PENDENS**.

Of personal property, see **SALES**.

Contracts to convey, see **VENDOR AND PURCHASER**.

CORPORATIONS:

See **MUNICIPAL CORPORATIONS**.

Finality of order directing assessment upon stockholders, see **APPEAL AND ERROR**, 1.

Acquisition of property by condemnation, see **EMINENT DOMAIN**.

1. **CORPORATIONS—CAPITAL STOCK—REDUCTION—DIVIDENDS—VALIDITY.** A transaction whereby the stock of a corporation was sold and issued for cash, and the entire sum received was disbursed by the corporation as a dividend and paid to shareholders, is prohibited by Rem. & Bal. Code, § 3697, making it unlawful for the trustees to make any dividend except from the net profits, or to divide, withdraw, or pay to stockholders any part of the capital stock or to re-

CORPORATIONS—CONTINUED.

- duce the same, except in the manner required by the act. *Brenaman v. Whitehouse* 355
2. SAME—CAPITAL STOCK—TRUST FUND—REDUCTION—SOLVENCY. The capital stock of a corporation being a trust fund for the payment of its debts, upon the faith of which the law presumes credit is given, a dividend reducing the amount of the capital stock is unlawful regardless of the solvency of the corporation at the time of the transaction. *Brenaman v. Whitehouse*..... 355
3. CORPORATIONS—CONTRACTS—OFFICERS AND AGENTS—NOTICE. Notice to an agent in apparent charge of the general office of a corporation, in the absence of its manager, that the guarantor of payment for coal supplied a vessel would not be personally liable for further supplies furnished the vessel, was sufficient to charge the corporation with such notice. *Canadian Colliers (Dunsmuir), Limited v. Humphrey* 457
4. CORPORATIONS—DEED OF TRUST—FORECLOSURE. Where a corporation in embarrassed circumstances, but still a going concern, issued negotiable bonds for the purpose of selling the same to pay indebtedness and obtain money to continue operations, and to secure same executed a deed of trust of the corporate properties to a trustee for the bondholders, and such trustee, to enable the corporation to meet current necessities pending the sale of the bonds, advanced money to the corporation as a loan on the pledge of the bonds, such trustee as pledgee of the bonds had priority over the general creditors and was entitled to foreclose its pledge. *Vancouver Trust & Savings Bank v. Union Woolen Mills*..... 114
5. CORPORATIONS — DEED OF TRUST — BOND ISSUE — ASSIGNMENT FOR BENEFIT OF CREDITORS. The execution of a deed of trust by a corporation to secure its bonds, issued with a view to their sale for the purpose of changing due obligations into time obligations and of raising funds for current expenses, and the assignment of the bonds to the trustee bank, which made advances thereon to meet temporary necessities of the corporation pending the sale of the bonds, the trust deed reciting that the trustee should have no responsibility for the delivery of any of the bonds, and that it assumed no responsibility other than to hold the deed as trustee for the purchasers of the bonds, did not constitute an assignment for the benefit of creditors nor impose on the trustee the duty of selling the bonds. *Vancouver Trust & Savings Bank v. Union Woolen Mills*..... 114
6. CORPORATIONS—RECEIVERS—COMPLAINT—SUFFICIENCY. A complaint by a stockholder for the appointment of a receiver for a solvent corporation on the ground of maladministration and mismanagement must allege facts showing maladministration and mismanagement, the general charge of that state of affairs being nothing more than a conclusion. *Curtiss v. Dean & Curtiss*..... 435

CORPORATIONS—CONTINUED.

7. **CORPORATIONS—RECEIVERS—GROUNDS—MISMANAGEMENT—LOSS.** A receiver will not be appointed for a solvent corporation, in the absence of a charge of fraud or infringement of the legal rights of minority stockholders, because the business has been conducted at a loss for a period of time prior to the institution of a suit therefor, nor because the minority stockholders believe the policy of the majority in the manner of conducting the business and changing the location thereof is hurtful to the corporate interests. *Curtiss v. Dean & Curtiss*..... 435
8. **CORPORATIONS—RECEIVERS—GROUNDS—MISMANAGEMENT—SALARY INCREASE.** The fact that the majority stockholders in a solvent corporation raise the salary of the manager, while the business is conducted at a loss, is not a ground for the appointment of a receiver; since, if such increase is illegal, the remedy is an action to restrain its future payment and for the recovery of any illegal salary which has been previously paid. *Curtiss v. Dean & Curtiss*..... 435
9. **CORPORATIONS—FOREIGN CORPORATIONS—RECEIVERS—JURISDICTION—ASSESSMENT AGAINST STOCKHOLDERS.** The courts of one state have no jurisdiction to appoint a general receiver for a foreign corporation, but may appoint a receiver for the assets of the foreign corporation which are within the particular state where the action is brought, and these assets may be subjected to the claims of creditors of the corporation; hence such local or ancillary receivership would be without power to direct an assessment and call upon stockholders for the balance of their unpaid subscriptions to the stock of a foreign corporation. *Pacific Coast Coal Co. v. Esary*..... 448

CORRECTION:

Of errors at trial, see TRIAL, 2, 5.

COSTS:

Of local improvement, apportionment, see MUNICIPAL CORPORATIONS, 5.
Estimated cost of improvement as limitation on power of city to assess property, see MUNICIPAL CORPORATIONS, 11, 14.

1. **COSTS—APPEAL—AWARD TO UNSUCCESSFUL PARTY.** The allowance of costs in a suit in equity being a matter within the discretion of the court, on reversing an appeal, it is proper to award costs against the appellant, where the case is a test one and has an importance to the appellant aside from the reversal of the case at issue, as it affects every member of it. *Thomas v. Knights of the Maccabees of the World* 665

COUNCIL:

See MUNICIPAL CORPORATIONS, 4-6.

COUNTIES:

Liability for injuries from defective highway, see **HIGHWAYS**.

COURTS:

Review of decisions, see **APPEAL AND ERROR**.

Appointment of receiver for foreign corporation, see **CORPORATIONS**, 9.

Award of temporary maintenance and suit money pending action for separate maintenance, see **HUSBAND AND WIFE**, 2.

Appointment of guardian for incompetent person, see **INSANE PERSONS**.

Mandamus to courts, see **MANDAMUS**.

Power to correct mistakes at trial of cause, see **TRIAL**, 2, 5.

Change of venue for prejudice of judge, see **VENUE**. ..

CREDIBILITY:

Of witness, see **WITNESSES**, 3.

CREDITORS:

Conveyance by intestate in fraud of, see **EXECUTORS AND ADMINISTRATORS**, 1.

Conveyances in fraud of, see **FRAUDULENT CONVEYANCES**.

Subrogation to rights of creditor, see **SUBROGATION**.

CRIMINAL LAW:

See **ASSAULT AND BATTERY**; **MALICIOUS PROSECUTION**, 1; **RAPE**.

Examination of witnesses, see **WITNESSES**, 2.

1. **CRIMINAL LAW—EVIDENCE—SIMILAR OFFENSES—ADMISSIBILITY.** In a prosecution for larceny based upon the deposit in bank of checks drawn by defendant on another bank in which he had no funds, the defendant assuming to be a man of means and negotiating for the purchase of a majority of the capital stock of the bank in which the fictitious deposit was made, evidence of a prior similar transaction in which the defendant attempted to purchase another bank, but was not able to consummate it on account of his financial inability, was admissible on the grounds of showing intent and as bearing on his inability to deposit funds in the bank on which his checks were drawn before the latter could be presented for payment. *State v. Gunn* 121
2. **CRIMINAL LAW—EVIDENCE—ADMISSIONS.** In a prosecution for assault, declarations made by defendant on his arrest, tending to show intent or motive as to the offense charged, are admissible; and the fact that, interspersed through the conversation testified as had with the defendant, were probable references to feeling between him and other parties in the neighborhood would not constitute prejudicial error. *State v. Ross*..... 218
3. **CRIMINAL LAW—RECEPTION OF EVIDENCE—OBJECTION.** Where testimony in a criminal prosecution might be admissible for some pur-

CRIMINAL LAW—CONTINUED.

- pose, error cannot be predicated upon its admission over a general objection which states no grounds therefor, and when no motion was interposed to strike the testimony because not properly connected with the transaction in controversy. *State v. Gunn*..... 121
4. CRIMINAL LAW—APPEAL AND ERROR—ASSIGNMENT OF ERROR. Alleged misconduct of counsel in argument to the jury, presented not by a stenographer's report or certificate of the judge, but by affidavits of opposing counsel on a motion for a new trial, which was denied by the judge in whose presence and hearing the incident complained of occurred, raises no question for review on appeal. *State v. Ross*..... 218
5. CRIMINAL LAW—APPEAL AND ERROR—REVIEW—FAILURE TO GIVE INSTRUCTIONS. Under art. 4, § 16, of the state constitution providing that "judges shall declare the law," and under Rem. & Bal. Code, § 2308, which provides that "every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt," the inadvertence of the court in failing to instruct on the presumption of innocence is not prejudicial error, where no request had been made for such instruction, and the court gave a correct instruction as to reasonable doubt and the requirements of the prosecution in establishing a case. *State v. Ross*..... 218

CROSS-APPEALS:

See APPEAL AND ERROR, 45.

CROSS-EXAMINATION:

See WITNESSES, 2.

CUSTOMS AND USAGES:

Expert testimony as to custom in collection of check, see BILLS AND NOTES, 15.

DAMAGES:

Review of verdict on appeal, see APPEAL AND ERROR, 33.

Breach of contract of carriage, see CARRIERS.

Taking and damaging property without payment of compensation, see CONSTITUTIONAL LAW, 7.

For wrongful death, see DEATH.

Compensation for property taken or damaged for public use, see EMINENT DOMAIN.

For fraud, see FRAUD, 3.

For publication of libel, see LIBEL AND SLANDER, 9-11.

To abutting property from operation of railroad, see RAILROADS.

Injury to scow in possession of bailee, see SHIPPING.

For obstruction of water course, see WATERS AND WATER COURSES.

DAMAGES—CONTINUED.

1. **DAMAGES—PERSONAL INJURIES—FUTURE SUFFERING.** Evidence of physicians to the effect that an injury causing a depression in the skull of a young child would probably in the future cause epilepsy, paralysis, convulsions or pains and nervousness is inadmissible as a speculative conclusion as to possible consequences, rather than evidence of consequences reasonably certain to ensue from the injury. *Clifford v. Washington Water Power Co.*..... 341
2. **DAMAGES—EXCESSIVE DAMAGES—INJURIES TO ARM AND WRIST.** In a personal injury case, where the court finds that plaintiff's body was severely bruised, that she suffered a colles fracture of the right arm, and that there was a permanent injury to her wrist, a judgment for \$900 for the injuries, and their attendant inconvenience, pain and suffering, was not excessive. *Burke v. Seattle.*..... 445
3. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** In an action for personal injuries sustained by a laborer, 35 years of age, capable of earning \$2.50 a day, a verdict for \$12,500 was excessive and should be reduced to \$7,500, although some two years after the injury, he was unable to dispense with a leather and steel jacket to support his trunk, and the fracture of the vertebrae still exists, and he still suffers some pain; since the former sum placed at seven per cent interest, would yield him more than his earning capacity for the whole of his expectancy, and he would still have the principal left. *Mosso v. Stanton Co.*..... 499

DEATH:

1. **DEATH—STATUTES—NEW CAUSE OF ACTION—AMOUNT OF RECOVERY.** The Federal employers' liability act must be construed, like the statute giving a right of action for wrongful death, as granting a new and independent cause of action for the benefit of the dependent relatives named in the statute, and the damages recoverable are limited to the financial loss sustained by their being deprived of a reasonable expectation of pecuniary benefit by the wrongful death. *Fogarty v. Northern Pac. R. Co.*..... 90
2. **DEATH—ABANDONMENT OF WIFE AND CHILD—EFFECT.** The abandonment of a wife and child by the husband and father, with the intention of not supporting them, his ability to do so being shown, would not deprive them of a right to recover for his wrongful death, under the provisions of the Federal employers' liability act, since there was a legal duty on deceased's part to furnish assistance and support to his wife and child, and the fact of abandonment would be material only in mitigation of damages. *Fogarty v. Northern Pac. R. Co.*..... 90

DEBT:

Promise to pay debt of another, see **FRAUDS, STATUTE OF**, 1, 2.
 Evidence of existence of at time of conveyance, see **FRAUDULENT CONVEYANCES**, 6.

DEBTOR AND CREDITOR:

See FRAUDULENT CONVEYANCES.

Subrogation to rights of creditor, see SUBROGATION.

DECEDENTS:

Estates, see EXECUTORS AND ADMINISTRATORS.

Testimony as to transactions with, see WITNESSES, 1.

DECISION:

On appeal as law of case, see APPEAL AND ERROR, 29, 30.

On appeal, construction of, see APPEAL AND ERROR, 55.

DECLARATIONS:

As evidence in criminal prosecutions, see CRIMINAL LAW, 2.

Against interest, see WITNESSES, 1.

DEDICATION:

See HIGHWAYS, 1-3.

DEDUCTION:

Of real estate value in assessing bank stock, see TAXATION, 3.

DEEDS:

Deed of trust of corporate property, see CORPORATIONS, 4, 5.

In fraud of creditors, see FRAUDULENT CONVEYANCES, 1, 4, 5, 8.

Lost deeds, see LOST INSTRUMENTS, 2.

Absolute deed as mortgage, see MORTGAGES.

DEFECT:

In city street, see MUNICIPAL CORPORATIONS, 20, 30.

DEGREES:

Of assault, instructions, see ASSAULT AND BATTERY, 1.

DELAY:

As extending time for filing brief, see APPEAL AND ERROR, 19.

In presentment of check for payment, see BILLS AND NOTES, 4.

In transporting goods, see CARRIERS.

In recording conveyance until after filing of *lis pendens*, see LIS PENDENS.

DELIVERY:

Of bill of exchange or promissory note, see BILLS AND NOTES, 8, 13.

Of goods sold, see FRAUDS, STATUTE OF, 3.

DEMAND:

By vendor for installments due on contract, see VENDOR AND PURCHASER, 1.

DEMURRER:

As constituting appearance, see **APPEARANCE**.

DEPOSITIONS:

1. **DEPOSITIONS—OBJECTIONS—WAIVER.** A general objection to the reading of a deposition of a witness at the time it was offered in evidence, without basing the objection upon some specific ground of inadmissibility, waives the necessity of the opposing party proving that the deposition was authorized under the statute. *State Bank of Clarkston v. Morrison*..... 182

DILIGENCE:

In procuring newly discovered evidence, see **NEW TRIAL**.

DIRECTING VERDICT:

In civil actions, see **TRIAL**, 2-4.

DISCRETION OF COURT:

Review of discretion in ruling on motion for new trial, see **APPEAL AND ERROR**, 23.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see **APPEAL AND ERROR**, 2, 18, 20.

DISSOLUTION:

Of partnership, see **ATTORNEY AND CLIENT**.

DISTRICTS:

Local improvement districts, see **MUNICIPAL CORPORATIONS**, 7.
Commercial waterway districts, see **NAVIGABLE WATERS**.

DIVERSION:

Law prohibiting diversion of special funds as temporary loans, see **STATUTES**, 1, 9.

DIVIDENDS:

Legality of stock dividends, see **CORPORATIONS**, 1, 2.

DIVORCE:

Mandamus to compel court to proceed with trial, see **MANDAMUS**.

1. **DIVORCE—PAYMENT OF ALIMONY PENDENTE LITE—TRIAL.** Where the husband is in default in paying alimony pending divorce proceedings against his wife, it is not an abuse of discretion on the part of the trial court to refuse to proceed with the cause upon the merits until the order requiring the payment of alimony is complied with. *State ex rel. Crombie v. Superior Court*..... 607

DOMICILE:

Of incompetent person, see **INSANE PERSONS**, 1, 2.
Of owner as situs of vessel for purpose of taxation, see **TAXATION**, 2.

DUE PROCESS OF LAW:

See CONSTITUTIONAL LAW, 5-7.

DURESS:

In obtaining notes, see **BILLS AND NOTES**, 1, 2.

DYNAMITE:

Injury to minor from explosion of dynamite cap, see **EXPLOSIVES**, 1-3.

EMERGENCY:

As defeating right to referendum, see **STATUTES**, 6-9, 11-13.

EMINENT DOMAIN:

Change of street grade as taking and damaging of property, see **CONSTITUTIONAL LAW**, 7.

Public improvements by municipalities, see **MUNICIPAL CORPORATIONS**, 16-19.

1. **EMINENT DOMAIN—COMPENSATION—REGULATION BY PUBLIC SERVICE COMMISSION.** While the public service commission has plenary powers to regulate all public utilities within the state, it has no power, under a pretended public use or a pretended exercise of the police power of the state, to so regulate as to amount to an appropriation of property, without just compensation being first made and paid to the owner. *State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co.*..... 29
2. **EMINENT DOMAIN—RIGHT TO COMPENSATION—DAMNUM ABSQUE INJURIA.** The constitutional guaranty (Const., art. 1, § 16) that no private property shall be taken or damaged without just compensation is applicable to injuries arising from the commission of some actionable wrong, and does not authorize compensation for depreciation in value caused by a legal act which is in law *damnum absque injuria*. *Taylor v. Chicago, Milwaukee & St. Paul R. Co.*..... 592
3. **EMINENT DOMAIN—RIGHT OF PROPERTY OWNER—ABANDONMENT OF PROCEEDINGS.** A decree in condemnation proceedings giving a county a right to appropriate land for a county road upon payment of the award is not an appropriation of the land, entitling the landowner to payment of the award; hence the county could not be forced to proceed to a consummation of the appropriation, when the county board, in the exercise of its legislative discretion, has decided to abandon proceedings; as the courts will not control discretion of a legislative character. *State ex rel. Struntz v. Spokane County*.. 187
4. **EMINENT DOMAIN—RIGHT OF PROPERTY OWNER UNDER JUDGMENT OF APPROPRIATION.** The entry of judgment on an award in condemnation proceedings gives no vested right to the damages awarded, since the condemning party can obtain no vested right in the land until it has paid the award, and hence the other party can have no

EMINENT DOMAIN—CONTINUED.

vested right in the award until, by its payment, title to the land is vested in the condemning party. *State ex rel. Struntz v. Spokane County* 187

EMPLOYEES:

See MASTER AND SERVANT.

EMPLOYER'S LIABILITY ACT:

Recovery under for wrongful death, see DEATH.

ENACTMENT:

Of laws, see STATUTES.

ENFORCEMENT:

Of judgment, limitations, see JUDGMENT.

EQUITY:

See FRAUDULENT CONVEYANCES; INJUNCTION; SUBROGATION.

Costs on appeal in equity suit, see COSTS.

Equitable relief to parties not appealing from judgment confirming assessment roll, see MUNICIPAL CORPORATIONS, 18.

1. EQUITY—CLEAN HANDS—DIFFERENT TRANSACTIONS. There is no foundation for the contention that plaintiff had not come into court with clean hands, when he sought to enforce his equities against the fraud of his partners, on account of misrepresentations made by him to an attorney who was to have an interest in the partnership claims in consideration of services, when the attorney was not in court complaining of plaintiff, and, in fact, had been satisfied to accept a settlement on the basis of representations made to him by other members of the partnership. *Galbraith v. Devlin*..... 482

ESTABLISHMENT:

Of lost instrument, see LOST INSTRUMENTS.

Of commercial waterway district, see NAVIGABLE WATERS.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

ESTIMATES:

Of cost of local improvement, see MUNICIPAL CORPORATIONS, 11, 14.

ESTOPPEL:

Of fraternal benefit society against increase of assessment rates, see INSURANCE, 9.

To invoke statute, see LIMITATION OF ACTIONS.

EVIDENCE:

- See DAMAGES, 1; DEPOSITIONS; FRAUDULENT CONVEYANCES, 4-8.
 - Consent of parent to adoption of child, see ADOPTION, 1.
 - Of abandonment of child by parent, see ADOPTION, 2.
 - Objections for purpose of review, see APPEAL AND ERROR, 3.
 - Incorporation in record on appeal, see APPEAL AND ERROR, 13, 15.
 - Harmless error in rulings on, see APPEAL AND ERROR, 48-51.
 - Of assault in second degree, see ASSAULT AND BATTERY, 2.
 - Of duress in execution of notes, see BILLS AND NOTES, 2.
 - Consideration for guarantee by accommodation indorsers, see BILLS AND NOTES, 11.
 - Expert testimony as to custom in collection of check, see BILLS AND NOTES, 15.
 - Performance of contract, see CONTRACTS, 2.
 - In criminal prosecutions, see CRIMINAL LAW, 1-3.
 - Disputed claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 2.
 - To show original promise to pay debt of another, see FRAUDS, STATUTE OF, 1.
 - Of invitation to public to use highway, see HIGHWAYS, 3.
 - For personal injuries, see HIGHWAYS, 4; MUNICIPAL CORPORATIONS, 21, 30.
 - In action to vacate appointment of guardian, see INSANE PERSONS, 5.
 - In prosecution for publication of libel, see LIBEL AND SLANDER, 7, 8, 10.
 - To establish lost instrument, see LOST INSTRUMENTS.
 - Malice in causing arrest, see MALICIOUS PROSECUTION, 3.
 - For injuries to servant in general, see MASTER AND SERVANT, 4.
 - Of mailing notice to owner of materials furnished, see MECHANICS' LIENS, 1.
 - To show absolute deed as mortgage, see MORTGAGES.
 - Newly discovered ground for new trial, see NEW TRIAL.
 - Existence of partnership relation, see PARTNERSHIP, 1.
 - Of consideration for assignment of patent, see PATENTS, 2.
 - In prosecution for rape, see RAPE.
 - Fraud inducing sale of business, see SALES, 3.
 - Of invalidity of order of public service commission, see TELEGRAPHS AND TELEPHONES, 2.
 - Of unfair use of trade label, see TRADE-MARKS AND TRADE-NAMES, 2.
 - Applicability of instructions to evidence, see TRIAL, 7.
 - For rescission of contract to sell land, see VENDOR AND PURCHASER, 3.
 - Testimony of witnesses, see WITNESSES.
1. EVIDENCE — CHARACTER — CAREFULNESS IN DISCHARGING DUTIES.
 In an action against a notary public and his bondsman for a specific act of negligent discharge of duties in taking an acknowledgment, evidence that he was ordinarily careful in taking acknowledgments, was inadmissible. *Kangley v. Rogers*..... 250

EVIDENCE—CONTINUED.

2. **EVIDENCE—PAROL EVIDENCE—LIABILITY ON NOTE.** An oral agreement made prior to the execution and delivery of a promissory note, affecting the manner in which it is to be paid, cannot be shown for the purpose of modifying or contradicting the written obligation. *Gwinn v. Ford*..... 571

EXAMINATION:

Of witnesses in general, see **WITNESSES**.

EXCEPTIONS:

Necessity for purpose of review, see **APPEAL AND ERROR**, 4-7.

Bills excepted from operation of referendum, see **STATUTES**, 4-9.

EXCEPTIONS, BILL OF:

Necessity for purpose of review, see **APPEAL AND ERROR**, 5, 13, 14, 20, 21.

EXCESSIVE DAMAGES:

See **DAMAGES**, 2, 3.

EXCESSIVE VERDICT:

For loss on fire insurance policy, see **INSURANCE**, 2.

EXCHANGE OF PROPERTY:

1. **EXCHANGE OF PROPERTY—CONTRACT—MISTAKE—EFFECT.** Where by mutual mistake, a contract for the exchange of property omitted mention of a right of way to which one of the properties was subject, the court may find the intention of the parties, and allow recovery without removing the cloud on the title caused by the mistake. *Calhoun, Denny & Ewing v. Pederson*..... 630
2. **SAME—CONTRACT—REPUDIATION—EFFECT.** Where one of the parties to a contract for the exchange of property declares that he will not perform on his part, the other is not required to tender performance before bringing action to recover for the breach thereof. *Calhoun, Denny & Ewing v. Pederson*..... 630
3. **SAME—REPUDIATION—EFFECT ON ARBITRATION AGREEMENT.** Where one party to a contract for the exchange of property elects to abandon it and so notifies the other parties, the latter are released from performance on their part in the manner specified in the contract; hence an agreement in the contract that the matters in dispute should be submitted to arbitration cannot be invoked against their right of action upon the contract. *Calhoun, Denny & Ewing v. Pederson* 630
4. **EXCHANGE OF PROPERTY—VALIDITY—FRAUDULENT REPRESENTATIONS—MATERIALITY.** Plaintiffs are entitled to rescission of a contract and cancellation of a deed given in exchange for a hotel lease and furni-

EXCHANGE OF PROPERTY—CONTINUED.

ture, on the ground of false and fraudulent representations, where the defendants represented to plaintiffs that the hotel had a good patronage and was a money maker, making a profit of from \$200 to \$450 per month, according to the college season, whereas the hotel had been a losing proposition at all times, and further represented that the furniture was clear of incumbrances, when in fact it was subject to a chattel mortgage for \$750, upon which fraudulent representations plaintiffs relied in making the exchange. *Gillette v. Anderson* 81

5. EXCHANGE OF PROPERTY—RESCISSION—TIME. A delay of three months in claiming rescission of a contract for the purchase of a hotel would not constitute a waiver of the right, where the party seeking rescission had merely waited until the falsity of the representation that the larger part of the profits of the hotel would be realized during the college year had been fully demonstrated; since the fact that the purchasers had examined the hotel in advance would not be sufficient in itself to put them upon notice as to the constancy of its business or the ordinary receipts, such matters being within the knowledge of the vendors only, upon whose representations the purchasers would be justified in relying. *Gillette v. Anderson* 81

EXECUTORS AND ADMINISTRATORS:

1. EXECUTORS AND ADMINISTRATORS—FRAUDULENT CONVEYANCE—SUIT TO SET ASIDE—COMPLAINT—SUFFICIENCY. In an action by an administrator to set aside a transfer of his intestate as in fraud of creditors, it is unnecessary that the complaint allege the names of creditors who would be defrauded by reason of such transfer, where it appears that the estate was insolvent. *Peterson v. Tull*..... 546
2. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—CARE OF DECEASED—EVIDENCE—SUFFICIENCY. A claim against an estate for board, expenses and services rendered to the deceased in a filial relation, is substantiated, and the verdict of a jury thereon will be sustained, where it appears that the deceased was old, ill, and helpless, that he had been in the habit of staying with strangers and paying for his board, until his condition required much attention and the person keeping him refused to longer do so, and sent for claimants to take and care for him; that the services were performed, a partial liability admitted, and none of the other children had taken any care of the deceased. *Thompson v. Jackson*..... 330

EXEMPTIONS:

Measures exempt from operation of referendum, see STATUTES, 4-9.
From taxation, see TAXATION, 1

EXPENSES:

Sharing expenses of enterprise as showing existence of partnership,
see **PARTNERSHIP**, 1.

EXPERT TESTIMONY:

As to custom in collection of check, see **BILLS AND NOTES**, 15.

EXPLOSIVES:

1. **EXPLOSIVES—INJURIES—NEGLIGENCE—QUESTION FOR JURY.** In an action by a minor child for injuries sustained from the explosion of a dynamite cap, there was sufficient evidence of defendant's negligence to go to the jury, where it appears that a partly filled box of dynamite caps was found by boys in the soil pit of defendant's brick yard, where they were used by defendant's employees and were, from time to time, left for indefinite periods, and no one in particular of the employees was held responsible by the defendant for their care and custody; it being a reasonable and natural inference that the caps were where found as a result of the work in which they were used at that place, and through the agency of the men charged with the blasting. *Mathis v. Granger Brick & Tile Co.*..... 634
2. **SAME—NEGLIGENCE—INTERVENING CAUSE—QUESTION FOR JURY.** Where there is evidence sufficient for the jury as to defendant's negligence in not safeguarding dynamite caps, which came into the possession of young boys, a question as to whether such negligence was the proximate cause of the injury to another child, or whether an independent, intervening, efficient factor relieved defendant from liability, is a question for the jury, where it appears that two boys of fourteen and thirteen years of age, who found the dynamite caps, carried them around in their pockets not knowing that they could be exploded in any other way than by a fuse, until by experience they learned otherwise, and it was doubtful whether they appreciated their dangerous character; that, in running and playing on the school grounds, a cap fell from the pocket of one of the boys, and was seen and picked up by plaintiff, a child of eleven years, who, not knowing what it was, carried it several days in the pocket of his overalls without showing it to any one; that in washing the overalls, his mother removed all the trinkets from the pockets, including the cap, which plaintiff took up and began picking the substance out with a hairpin, when it exploded, causing the injuries complained of. *Mathis v. Granger Brick & Tile Co.*..... 634
3. **SAME.** In such a case, the act of the mother in noticing the dynamite cap in taking the things from her son's pockets was not an independent, intervening, efficient cause of plaintiff's injuries, where she testified she had never seen a dynamite cap, and laid it on one

EXPLOSIVES—CONTINUED.

side, with the other things, "not dreaming of its being a dynamite cap." *Mathis v. Granger Brick & Tile Co.*..... 634

4. **EXPLOSIVES—INJURIES FROM BLAST—TRIAL—INSTRUCTIONS—INFERENCES—BURDEN OF PROOF.** In an action for personal injuries caused by the explosion of a blast, wherein proof of the injury made a *prima facie* case of negligence, instructions to that effect and that the jury should then "determine from the evidence, the burden being upon the defendants, whether or not these defendants in the conduct of their work were careless and negligent in the manner in which they conducted their blasting," without any other charge that the burden of proof was upon the plaintiffs to establish the injury, and elements of her case, constituted prejudicial error; since it inferred that the burden was upon defendants to disprove, by a preponderance of the evidence, all the allegations and proof on the part of plaintiffs. *Briglio v. Holt & Jeffery.*..... 155
5. **EXPLOSIVES—BURDEN OF PROOF—RES IPSA LOQUITUR.** The presumption of want of due care under the doctrine of *res ipsa loquitur* is applicable to injuries from blasting, and while it places the burden of proof on defendant, such presumption is rebutted when evidence and inferences are shown, not necessarily preponderating against, but merely counterbalancing the inference derived from, the presumption. *Briglio v. Holt & Jeffery.*..... 155

FAIRWAY:

See COLLISION.

FALSITY:

Of publication, pleading and proof, see LIBEL AND SLANDER, 5.

FEES:

Of attorney, see ATTORNEY AND CLIENT, 1, 2, 4.

Personal liability of receiver for attorney's fees, see RECEIVERS.

FELLOW SERVANTS:

See MASTER AND SERVANT, 3.

FILING:

Of abstract and brief on appeal, see APPEAL AND ERROR, 19.

Notice of *lis pendens*, see LIS PENDENS.

Partnership designation, waiver of objections, see PARTNERSHIP, 3.

FINAL JUDGMENT:

See APPEAL AND ERROR, 1, 11, 12.

FINDINGS:

Review of on appeal, see **APPEAL AND ERROR**, 34-42.

Review of findings in eminent domain, on attack on assessment roll, see **MUNICIPAL CORPORATIONS**, 16.

By court in civil actions, see **TRIAL**, 6.

FIRE INSURANCE:

See **INSURANCE**, 1, 2.

FORCIBLE ENTRY AND DETAINER:

1. **FORCIBLE ENTRY AND DETAINER — DEFENSES — PARAMOUNT TITLE.**
Paramount title and right of possession as a homesteader under the laws of the United States, is not an affirmative defense to an action of forcible entry and detainer under Rem. & Bal. Code, § 811, providing that every person who, in the nighttime or during the absence of the occupant of real property, unlawfully enters thereon or who, after demand, refuses for three days to surrender the same, and defining the occupant as one who, for the five days next preceding, was in the peaceable and undisturbed possession of the property, and § 825 expressly limiting the issues in such action to the questions of forcible entry and detainer and occupancy as defined in the act. *Ridpath v. Denec*..... 322
2. **SAME — ENTRY — DEFENSES — RIGHTS OF HOMESTEADERS — FEDERAL STATUTES.** Our statutes of forcible entry and detainer, Rem. & Bal. Code, §§ 811, 825, are not in conflict with U. S. Rev. Stat., § 2289, authorizing the head of a family to enter a homestead, since Congress has not prescribed the forum for redressing the wrongs of claimants wrongfully dispossessed, but has left the same to local tribunals. *Ridpath v. Denec*..... 322
3. **SAME—DEFENSES—PUBLIC LANDS—LAWFULNESS OF ENCLOSURE.** 23 Stat. L. 321, 322, to the effect that all enclosures of any public lands of the United States, made by any person having no claim or color of title made in good faith, are unlawful, does not entitle the defendant in an action of unlawful detainer, to show that the plaintiff had enclosed and was in unlawful possession of the land in question, being government land, and was not a qualified homesteader, where it clearly appears that the enclosure was made and possession taken and maintained for twenty years, by the plaintiff and his predecessors in interest, under claim of right and color of title, having purchased the land at a fair price. *Ridpath v. Denec*..... 322
4. **SAME—DEFENSES—POSSESSION OF PLAINTIFF—QUESTION FOR JURY.**
In an action for unlawful detainer, in which defendant claimed that the plaintiff had leased the land and that the lease had not expired, the question of plaintiff's possession was for the jury, where there was evidence that the lease had been surrendered several months previously and plaintiff had resumed actual possession. *Ridpath v. Denec* 322

FORECLOSURE:

Of pledge of corporate bonds, see **CORPORATIONS**, 4.

Of lien, see **MECHANICS' LIENS**.

Rights of mortgagor paying debt after sale of property, see **SUBROGATION**, 2.

FOREIGN CORPORATIONS:

See **CORPORATIONS**, 9.

FORFEITURE:

Of insurance, see **INSURANCE**, 1.

Relocation of forfeited mining claim, see **MINES AND MINERALS**.

Of contract for sale of land, see **VENDOR AND PURCHASER**, 1.

FRAUD:

See **BILLS AND NOTES**, 6, 12; **FRAUDULENT CONVEYANCES**; **SALES**, 1-3.

False certificate by notary public, see **ACKNOWLEDGMENT**.

Inducing exchange of property, see **EXCHANGE OF PROPERTY**, 4, 5.

Against partner, see **PARTNERSHIP**, 2.

Rescission of assignment of patent for false statements of assignee, see **PATENTS**.

Unfair competition in use of label for goods, see **TRADE-MARKS AND TRADE-NAMES**.

Sales of realty, see **VENDOR AND PURCHASER**, 2, 3.

1. **FRAUD—MISREPRESENTATION—MATTERS OF RECORD—RELIANCE.** A party may rely upon a statement as to a fact made to him by another as a basis for a mutual engagement, where the facts are unknown to him but known to the other and are made for the purpose of inducing a reliance thereon, even though the statement was as to the amount of city assessments against lots, which was a matter of record, the truth or falsity of which could have been ascertained by an inspection of the public records. *Crawford v. Armacost* 622
2. **FRAUD—MISREPRESENTATIONS—VENDOR AND PURCHASER.** A false representation as to the estimate of the cost of a street improvement made to a prospective purchaser is a false representation as to a material fact, and not a mere expression of opinion. *Crawford v. Armacost* 622
3. **FRAUD—MISREPRESENTATIONS—DAMAGES.** Where one purchases property relying on the vendor's false representations that the estimated cost of an assessment thereon for a street improvement would not exceed a certain sum, and the cost was largely in excess, the purchaser would be injured to the extent of the difference between these two sums, regardless of the benefits conferred by the improvement. *Crawford v. Armacost*..... 622

FRAUDS, STATUTE OF:

Promise to pay for goods sold to another, see SALES, 6.

1. **FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—ORIGINAL OR COLLATERAL PROMISE—EVIDENCE.** A promise to pay the debt of another for goods sold is an original, and not a collateral one, where it was a direct promise to pay the debt "dollar for dollar," without qualification or reservation; and the fact that the goods were not charged to the promisor, but to the original debtor, would not in itself be sufficient to overcome a direct promise. *Lovell v. Hays*. 109
2. **FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER.** The verbal promise of a purchaser of lumber from the F. Company, made to the J. Company which was supplying the lumber to the F. Company so as to enable the F. Company to fill the order, to the effect that the purchaser would see that it "got its money," or would "stand good for it," is a promise to answer for the debt of another, and void under the statute of frauds, if not in writing. *First National Bank v. Geske & Co.*..... 477
3. **FRAUDS, STATUTE OF—DELIVERY OF GOODS.** Where one lumber company, not having on hand the class of lumber desired by a customer, ordered same from another company and the latter billed the lumber to the first company, but delivered it to the customer, the transaction is equivalent to a delivery to the company ordering the lumber, and hence not within the statute of frauds requiring a signed memorandum of sales of goods except where no delivery is made. *First National Bank v. Geske & Co.*..... 477
4. **FRAUDS, STATUTE OF—PLEADING AS DEFENSE—WAIVER.** Where the statute of frauds was not pleaded as a defense nor raised in any other manner on the trial, it was waived, when the complaint fully disclosed the basis of plaintiff's claim. *First National Bank v. Geske & Co.*..... 477

FRAUDULENT CONVEYANCES:

By Intestate, sufficiency of complaint in action by administrator, see EXECUTORS AND ADMINISTRATORS, 1.

Action to vacate and subject property to judgment lien, see JUDGMENT.

1. **FRAUDULENT CONVEYANCES—EQUITABLE TITLE.** Where the legal title to property is placed in one and the equitable title remains in the grantor, it is immaterial whether deeds back to the grantor were ever delivered, since equity will lodge the title where in truth it should be. *Peterson v. Tull*..... 546
2. **FRAUDULENT CONVEYANCES—BULK SALES LAW—PREFERENCE.** Where the value of a stock of goods taken by a creditor from a failing debtor is less than the amount due it on open account, the transaction amounts to no more than a preference and not a sale, and such

FRAUDULENT CONVEYANCES—CONTINUED.

creditor is not liable to garnishment under the sales-in-bulk act (Rem. & Bal. Code, §§ 5296-5300) for failure to require an affidavit and list of creditors. *Globe Electric Co. v. Montgomery*..... 452

3. FRAUDULENT CONVEYANCES — BONA FIDE PURCHASER — CONSIDERATION. One is a purchaser of real estate in good faith and for value, although part of the consideration may have been for a preexisting debt, where the balance of the consideration was the assumption of a mortgage debt and taxes on the property, which was a new consideration. *Merrick v. Pattison*..... 240
4. SAME—BONA FIDE PURCHASERS—SUFFICIENCY OF EVIDENCE. A finding that a grantee is not a purchaser for value and in good faith is sustained although he denied knowledge of the conditions existing, where it appears that the holder of the legal title quitclaimed to him for one dollar, and the circumstances and the evidence of an attorney indicated that he had notice of the equitable title, paid no consideration, and his evidence was evasive and improbable. *Peterson v. Tull*..... 546
5. SAME—BONA FIDE PURCHASERS—EVIDENCE. In an action to set aside a deed as a fraudulent conveyance, it was not error to permit counsel for the adverse party to interrogate the grantee as to what he paid for the property, when the only objection made was that the testimony was incompetent, irrelevant and immaterial. *Peterson v. Tull* 546
6. FRAUDULENT CONVEYANCES — EVIDENCE—INDEBTEDNESS. In a suit by judgment creditors to set aside a voluntary conveyance by a judgment debtor, made prior to the rendition of judgment against him, the existence of the debt at the time of the conveyance, as against an innocent grantee, cannot be shown by the introduction in evidence of the pleadings, findings and judgment in the prior case against the judgment debtor, since the recitals therein would not be evidence as against a grantee who was a stranger to the record in such prior action. *Eggleston v. Sheldon*..... 422
7. FRAUDULENT CONVEYANCES—ACTIONS—EVIDENCE—SUFFICIENCY. In an action by a trustee in bankruptcy for an insolvent corporation seeking to be decreed the owner of certain realty, on the assumption it had been held in trust for the bankrupt by one of its officers and subsequently conveyed away by the latter, a finding that the defendants had acquired the property in good faith is sustained by evidence that the property was worth \$2,000 or less; that the defendants gave in consideration therefor \$2,170 by cancelling a past due note, which with interest amounted to \$1,050, and assuming a mortgage and taxes on the property aggregating an additional \$1,120, that there was nothing of record suggesting that the bankrupt had an interest in the property, that the defendants had no actual notice of any such

FRAUDULENT CONVEYANCES—CONTINUED.

Interest, nor any knowledge that would have put them on inquiry.
Merrick v. Pattison..... 240

8. **FRAUDULENT CONVEYANCES—ACTION—EVIDENCE.** In an action to set aside fraudulent conveyances, evidence is admissible that the fraudulent grantee had testified in another action against her that she had executed a deed back to her grantor. *Peterson v. Tull*.. 546

FUNDS:

Law prohibiting diversion of special funds as temporary loan, see
STATUTES, 1, 9.

GOOD FAITH:

In transfer of property, see **FRAUDULENT CONVEYANCES**, 3-5, 7.
 In transactions between partners, see **PARTNERSHIP**, 2.

GRADE:

Change of street grade, see **MUNICIPAL CORPORATIONS**, 2.

GUARDIAN AND WARD:

Guardianship of insane persons, see **INSANE PERSONS**.

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 43-54.
 In criminal prosecution, see **CRIMINAL LAW**, 5.

HIGHWAYS:

Change of grade as taking and damaging of property, see **CONSTITUTIONAL LAW**, 7.

1. **HIGHWAYS—DUTY TO REPAIR—ACCEPTANCE OF PLAT.** Under Rem. & Bal. Code, § 8787, requiring the county auditor to keep a record of all plats which if situated outside of any incorporated town or village must first be approved by the board of county commissioners, and under Id., § 5575, giving the board general supervision over county roads in the county, and imposing the duty to open roads necessary for public convenience, the approval and filing of a plat does not cast upon the county the duty of keeping open every highway dedicated by the plat; but before such duty devolves upon the county, it must have invited the public to use such highway. *Tait v. King County* 491
2. **HIGHWAYS—EXISTENCE—DUTY TO REPAIR.** The fact that a roadway, dedication of which has been accepted by the county, may have been constructed by a private individual, would not necessarily absolve the county from any duty to keep it in reasonable repair. *Tait v. King County*..... 491
3. **HIGHWAYS—EXISTENCE—EVIDENCE—QUESTION FOR JURY.** In an action against a county for personal injuries suffered by reason of

HIGHWAYS—CONTINUED.

a defective highway dedicated in a plat, whether or not the county had impliedly invited the public to use the highway is a question for the jury, where it appeared that the county commissioners approved the plat and it was filed in the office of the county auditor, that thereafter the owner of the tract continued for a period of four or five months to grade the streets, presumably with the permission, express or implied, of the county commissioners, who had actual knowledge that the highway had been graded, promised to send out the road supervisor to look over the matter of repairs, and granted a franchise to put water mains in all the streets of the plat. *Tait v. King County*..... 491

4. **HIGHWAYS—ACTIONS—CONTRIBUTORY NEGLIGENCE—EVIDENCE — SUFFICIENCY.** Plaintiff cannot be charged with contributory negligence, as a matter of law, from the fact that she had knowledge of the hole in the highway into which she fell in the nighttime, where it appears that plaintiff had no knowledge of an undermined ledge around the hole, which gave way when she was close to the hole, while proceeding carefully on the lookout for it, previous knowledge of the defect being only a fact or circumstance bearing upon the question of contributory negligence, to be submitted to the jury along with all the facts and circumstances surrounding the accident. *Tait v. King County*..... 491

HOLDER IN DUE COURSE:

See **BILLS AND NOTES**, 3-9, 12, 16, 17.

HOMESTEAD:

Title and right of possession as homesteader as defense in action for unlawful detainer, see **FORCIBLE ENTRY AND DETAINER**, 1, 2.

HUSBAND AND WIFE:

See **DIVORCE**.

Right to recover for wrongful death of spouse, see **DEATH**.

1. **HUSBAND AND WIFE—COMMUNITY PROPERTY—LIABILITY.** The performance of the duties of notary public by the husband, being a community business engaged in for the benefit of both spouses, the community is liable on a judgment for his negligence in failing to faithfully discharge his duties as notary public. *Kangley v. Rogers*.. 250
2. **HUSBAND AND WIFE—ACTION FOR SEPARATE MAINTENANCE—TEMPORARY MAINTENANCE AND SUIT MONEY.** An action by a wife for separate maintenance being within the inherent jurisdiction of a court of equitable cognizance, independently of statute, the court may award temporary maintenance and suit money pending the action; and the fact that the only express statutory authority for such relief is restricted to divorce suits cannot be construed by implication as excluding such relief in an action for separate maintenance. *State ex. rel. Young v. Superior Court*..... 72

IMITATION:

Of label for like article of goods, see **TRADE-MARKS AND TRADE-NAMES**.

IMPEACHMENT:

Of certificate to bill of exceptions, see **APPEAL AND ERROR**, 21.

Of witness, see **WITNESSES**, 3.

IMPROVEMENTS:

Liens, see **MECHANICS' LIENS**.

Public improvements, see **MUNICIPAL CORPORATIONS**, 1, 3-19.

IMPUTED NEGLIGENCE:

See **NEGLIGENCE**, 1.

INCREASE:

Of salary of manager, as ground for receiver, see **CORPORATIONS**, 8.

Of assessment rate by fraternal benefit society, see **INSURANCE**, 4-13.

INCUMBRANCES:

False statement by vendor as to existence of, see **SALES**, 1.

INDEPENDENT CONTRACTORS:

See **MASTER AND SERVANT**, 5, 6.

INDICTMENT AND INFORMATION:

See **MALICIOUS PROSECUTION**, 1.

INDORSEMENT:

Of check or promissory note, see **BILLS AND NOTES**, 5, 7, 10, 11.

INFANTS:

See **ADOPTION**.

Personal injuries from explosion of dynamite cap, see **EXPLOSIVES**, 1-3.

INFRINGEMENT:

Of trade-mark, see **TRADE-MARKS AND TRADE-NAMES**.

INJUNCTION:

Enjoining use of trade label, see **TRADE-MARKS AND TRADE-NAMES**.

1. **INJUNCTION—PROTECTION OF PERSONAL RIGHTS — STRIKES — INTERFERENCE WITH EMPLOYEES.** In an action for injunctive relief against a printer's union to prevent interference with plaintiff's employees, who had taken the place of striking employees, a permanent injunction after a trial on the merits is properly denied, where the strike leader, who was inciting the strikers to acts of intimidation and was himself guilty of assault, had left the state and thereafter there had been no acts of violence and intimidation, for a period prior to suit and up to the trial, and there was no showing in the

INJUNCTION—CONTINUED.

evidence of any reasonable probability of further interference. *Commercial Bindery & Printing Co. v. Tacoma Typographical Union No. 170* 234

2. INJUNCTION — PROTECTION OF PERSONAL RIGHTS — INTERFERENCE WITH EMPLOYEES. The destruction of one's business through the intimidation of employees while in their employment is as much the subject of injunctive relief as is the destruction of physical property. *Commercial Bindery & Printing Co. v. Tacoma Typographical Union No. 170*..... 234

INSANE PERSONS:

1. INSANE PERSONS—PROTECTION OF INCOMPETENT—DOMICILE—POWER OF COURT. The appointment of a guardian for the estate of a person mentally incompetent, is within the power of the superior court of the county wherein such incompetent has property, whether such incompetent be a resident or a nonresident of the state; under Const., art 4, § 6, conferring general jurisdiction upon the superior courts of the state, and giving jurisdiction "in all special cases and proceedings as are not otherwise provided for," and under Rem. & Bal. Code, § 1654, providing that the several superior courts in their respective counties shall have power to appoint guardians for insane persons and incompetents, and of their estates, real and personal, and Id., §§ 1622-1625, providing the procedure for the appointment of guardians of incompetents wherein appointment for non-resident insane persons is recognized. *In re Stewart*..... 190
2. INSANE PERSONS — RESIDENCE OF INSANE PERSON—GUARDIANSHIP. A finding is warranted that an incompetent, for whom guardians had been appointed, both in the state of Florida and in the state of Washington, was a resident of this state where there is nothing to show that she and her husband had ever acquired a legal residence in Florida, other than the investment of money there and several visits to that state, on one of which the husband died, while on the other hand they had valuable interests in this state, and it is conceded that, at all times prior to the last visit to Florida, they had been citizens and residents of the state of Washington. *In re Stewart* 190
3. INSANE PERSONS—PROPRIETY OF APPOINTMENT OF GUARDIAN—PROPERTY OF WARD—CHOSE IN ACTION. A right of action by a person of unsound mind, to set aside a conveyance executed by her while laboring under the disability of mental incapacity, constitutes property in the county wherein the realty is located and warrants the appointment of a guardian therein for the enforcement of her interests. *In re Stewart*..... 190
4. INSANE PERSONS—APPOINTMENT OF GUARDIAN—COLLATERAL ATTACK. In an action by the guardian of a person of unsound mind to cancel

INSANE PERSONS—CONTINUED.

a deed made by her, an attack on the validity of the guardian's appointment, being collateral to the cause in issue, would not be entitled to consideration by the court. *Stewart v. Stewart*..... 202

5. **INSANE PERSONS—APPOINTMENT OF ANCILLARY GUARDIAN—ACTION TO VACATE—EVIDENCE.** In an action by a guardian for a person of unsound mind, appointed in the state of Florida, to vacate an appointment of a guardian for the same ward in the state of Washington, evidence showing the neglected condition of the ward in Florida was material as tending to show the good or bad faith of the Florida relatives, who had agreed to support and care for her in consideration of lands conveyed to them by her deceased husband, and as tending to advise the court of her condition so that her rights to protection might be made known. *In re Stewart*..... 190

INSOLVENCY:

Of fraudulent grantor, preference as to creditors, see **FRAUDULENT CONVEYANCES**, 2.

INSTRUCTIONS:

Necessity of exceptions to for purpose of review, see **APPEAL AND ERROR**, 5-7.

Presumption as to correctness of on appeal, see **APPEAL AND ERROR**, 28.

Harmless error in giving or refusing, see **APPEAL AND ERROR**, 52-54.

In criminal prosecutions, see **CRIMINAL LAW**, 5.

In civil actions, see **TRIAL**, 7-13.

INSURANCE:

1. **INSURANCE — FORFEITURE — NONPAYMENT OF NOTES FOR PREMIUMS.** Where an insurance policy does not prohibit payment of the premium by promissory note, and the company's agents issued a certificate of assignment to the insured reciting the payment of the premium, the acceptance of the note for the premium is a payment thereof; and nonpayment of such note at maturity does not work a forfeiture of the policy. *Goddard v. Northwestern Mutual Fire Association* 585
2. **INSURANCE—EXTENT OF LOSS—SALVAGE.** In an action for loss on a fire insurance policy, a verdict for the full market value of wheat lost in the burning of a storage warehouse was excessive, where, after the fire, the warehouseman sold a considerable quantity of damaged wheat, the larger portion of which was plaintiff's, and gave plaintiff credit thereon; and a proportionate reduction should be made in the amount of the verdict and judgment. *Goddard v. Northwestern Mutual Fire Association*..... 585
3. **INSURANCE — MUTUAL BENEFIT INSURANCE—RIGHT OF CERTIFICATE HOLDER.** A certificate of membership in a fraternal beneficiary so-

INSURANCE—CONTINUED.

cety assuring the payment of a benefit on the death of a member is not a contract in the commercial sense, but a mutual promise of every member to pay the certificate of every other member; hence there is no vested right in any provision of the contract, either express or implied, that is not subject to and controlled by the duty of the member to pay the cost of his own insurance, for under no construction of a mutual contract can he demand more than he is willing to give. *Thomas v. Knights of the Maccabees of the World* 665

4. SAME — MUTUAL BENEFIT INSURANCE — RIGHT OF CERTIFICATE HOLDER. An agreement made by a member of a fraternal beneficiary society, when accepting his certificate, to abide by all the laws, rules and regulations of the society that may have been or might thereafter be passed, binds him to observe such legislation as is calculated to insure a rate sufficiently adequate to pay the cost of his own insurance; hence the action of the society in raising the assessment rate subsequent to the issuance of his benefit certificate based on a lesser rate, on a finding of necessity therefor by the legislative authorities of the society, cannot be objected to by the member as a violation of his contract. *Thomas v. Knights of the Maccabees of the World* 665
5. SAME—RIGHT OF CERTIFICATE HOLDER. Where a member of a fraternal beneficiary society agreed, in accepting a benefit certificate, that the society might levy any number of assessments necessary to pay death losses, the imposition of increased rates distributing such payments over a number of years, instead of making more frequent assessments, cannot be regarded as a violation of a contract limiting his assessments to the rate fixed at the time of entering the society. *Thomas v. Knights of the Maccabees of the World*. 665
6. SAME—CONTRACTS—VESTED RIGHTS. There is no vested right in having a benefit certificate of a mutual fraternal society remain unchanged, for the reason that there can be no vested right in such contract so long as a duty to the other contracting parties rests upon the one asserting it and his duty is unperformed; hence a member of a mutual insurance society has no right to insist that it continue to do business upon an unsound basis for his individual benefit. *Thomas v. Knights of the Maccabees of the World*..... 665
7. SAME—INCREASE OF ASSESSMENTS. Where the old plan of assessment for a mutual insurance society proves a failure, and a readjustment of the rates charged is necessary so as to make the basis therefor conform to the cost of insurance according to the age of members, the fact that the burden of meeting the alleged deficiency in rates is cast upon those who have attained the age of fifty years or more, while the increase was not made applicable to the younger

INSURANCE—CONTINUED.

- class of members, is not the fixing of an arbitrary age and producing a class distinction, since it is made in conformity to the law of experience in such matters. *Thomas v. Knights of the Maccabees of the World* 665
8. SAME—INCREASE OF ASSESSMENTS. The increased rate for assessments affected by a fraternal benefit society being in conformity to the mortuary tables established by the National Fraternal Congress, as is required by the laws of this state, which become a part of every contract of insurance written herein, a member cannot complain of such action, though burdensome to him individually. *Thomas v. Knights of the Maccabees of the World*..... 665
9. SAME—INCREASE OF RATES—ESTOPPEL. The issuance and acceptance of a benefit certificate in a mutual fraternal society not being in the strict sense a contract, the doctrine of estoppel cannot be invoked against the society's increasing its assessment rates, by reason of the complaining party having been lured into joining by the provisions of its by-law fixing rates, the speeches of supreme officers, or other matters in the nature of estoppel. *Thomas v. Knights of the Maccabees of the World*..... 665
10. SAME—DEPRIVATION OF MEMBERSHIP—INCREASE OF RATES. The fact that a member of a fraternal beneficiary society will be turned out and thus lose all fraternal features of the society is no ground for defeating an increase in the rate of assessment, when that is found necessary to the continued life of the institution. *Thomas v. Knights of the Maccabees of the World*..... 665
11. SAME—AMENDMENT OF BY-LAWS. The fact that the rate of assessment on members of a mutual insurance society was fixed in a by-law at the time he entered the society, would not preclude the society from subsequently changing that, as well as any other, by-law, when the power of amendment is reserved as to all by-laws, and a condition attached to the issuance of the benefit certificate was a compliance with the laws in force or thereafter adopted. *Thomas v. Knights of the Maccabees of the World*..... 665
12. SAME—SURPLUS. The fact that there is money in the treasury of a mutual insurance society to be devoted to the payment of death benefits is not always a surplus or reserve nor does it necessarily show the lack of necessity for an increase in assessment rates, when in fact such sum is inadequate to meet payment of the death claims to which the society is actually pledged. *Thomas v. Knights of the Maccabees of the World*..... 665
13. SAME—RESCISSION OF CONTRACT. A member of a fraternal beneficiary society whose assessment rate has been increased for the purpose of enabling the society to adequately perform its functions cannot rescind his contract and recover the dues and assessments paid

INSURANCE—CONTINUED.

by him; since the society has not thereby repudiated the contract, but is endeavoring to perform it, and he cannot complain so long as he has had protection for less than cost. *Thomas v. Knights of the Maccabees of the World*..... 665

INVITATION:

To public to use highway, see **HIGHWAYS**, 1, 3.

JITNEY BUSES:

Validity of emergency clause in act to regulate, see **STATUTES**, 11-13.

JUDGES:

Absolute privilege from liability for slander, see **LIBEL AND SLANDER**, 1.

Mandamus to judge, see **MANDAMUS**.

Change of venue for prejudice of, see **VENUE**.

JUDGMENT:

Review, see **APPEAL AND ERROR**.

On appeal, construction, see **APPEAL AND ERROR**, 55.

Condemnation proceedings, see **EMINENT DOMAIN**, 3, 4.

Notwithstanding verdict, see **TRIAL**, 2-4.

Construction as finding, see **TRIAL**, 6.

1. **JUDGMENT—ACTIONS TO ENFORCE—LIMITATIONS—FRAUDULENT CONVEYANCES — SUIT TO SET ASIDE — TERMINATION OF LIEN OF JUDGMENT.** Under Rem. & Bal. Code, §§ 459-461, limiting the life of a judgment to a period of not more than six years from the date of its entry, an action by a judgment creditor to set aside a fraudulent conveyance and subject the property to the lien of a judgment would be barred, and the action is properly dismissed, after the lapse of six years after the entry of the judgment. *Johnson v. Great Northern Lumber Co.* 16

JURISDICTION:

Appellate jurisdiction, see **APPEAL AND ERROR**, 1, 2.

To appoint general receiver for foreign corporation, see **CORPORATIONS**, 9.

Effect of filing motion for change of judge, see **VENUE**.

JURY:

Instructions in criminal prosecutions, see **CRIMINAL LAW**, 5.

Verdict in civil actions, see **TRIAL**, 2-5.

Instructions in civil actions, see **TRIAL**, 7-13.

1. **JURY—TERM OF SERVICE—EXPIRATION DURING TRIAL—EFFECT.** If a jury is properly drawn and impaneled, and enters upon a trial within the regular jury term, it is a properly constituted jury to complete the trial, though it may carry them over their statutory term as

JURY—CONTINUED.

jurors; notwithstanding 3 Rem. & Bal. Code, § 94-4, providing jury terms to commence on the first Monday of each month and end on the Saturday preceding the first Monday of the next month unless changed by order of the judge, and notwithstanding that no such order for a change was made. *Beach v. Seattle*..... 379

2. **JURY — CHALLENGES — PREJUDICE.** Challenge for cause to a juror was properly sustained, on the ground that it would take evidence to remove his initial prejudice, where he admitted on examination that he had a prejudice against young people attending dances, and that the fact that the young people were returning from a social dance would prejudice him against plaintiff who was suing for injuries received while returning from a dance; even if the juror on further examination, stated that, while he was decidedly opposed to dances, if it appeared that plaintiff's injuries in no manner grew out of her having attended a dance, he would not lay that up against her, but would go according to the law and testimony. *Beach v. Seattle* 379

KNOWLEDGE:

By grantee of fraud in conveyance, see **FRAUDULENT CONVEYANCES**, 4, 7.

As affecting right to rescission of assignment of patent, see **PATENTS**.

LABELS:

Unfair competition in use of similar label for like article of goods, see **TRADE-MARKS AND TRADE-NAMES**.

LABOR UNIONS:

Enjoining interference by with employees, see **INJUNCTION**.

LACHES:

In rescission of contract of sale, see **VENDOR AND PURCHASER**, 3.

LARCENY:

Evidence of similar offense, see **CRIMINAL LAW**, 1.

LAST CLEAR CHANCE:

To avoid accident, see **MUNICIPAL CORPORATIONS**, 22.

LAW OF THE CASE:

See **APPEAL AND ERROR**, 29-30.

LEGISLATURE:

Enactment of statutes, see **STATUTES**.

LIBEL AND SLANDER:

1. **LIBEL AND SLANDER—PRIVILEGE—JUDGES.** A judge of a court is absolutely exempt from liability in damages for words of a slander-

LIBEL AND SLANDER—CONTINUED.

- ous nature spoken by him of one of the attorneys in the course of a judicial proceeding over which he was presiding. *Houghton v. Humphries* 50
2. LIBEL AND SLANDER—ACTIONABLE WORDS—PRIVILEGE. Newspaper publications falsely charging the plaintiffs with conducting a restaurant in an uncleanly and unsanitary manner do not fall within the rule of qualified privilege, and are therefore libelous *per se*. *Wilson v. Sun Publishing Co.* 503
3. SAME—INJURY TO BUSINESS. Under Rem. & Bal. Code, § 2424, providing that every malicious publication tending to expose any person to contempt, or to deprive him of public confidence, or to injure any person in his business or occupation shall be a libel, it is libelous *per se* to charge in newspaper articles that plaintiffs' restaurant is dirty, unsanitary, poorly ventilated, and the abode of microbes, etc., the natural tendency of the words used being to create the impression that the restaurant was an unwholesome place and unfit for public patronage. *Wilson v. Sun Publishing Co.* 503
4. SAME—CIVIL ACTION—MALICE. The civil action for damages for libel being, under the statutes of this state, one for the recovery of compensatory damages only, malice is not an essential element of allegation or proof. *Wilson v. Sun Publishing Co.* 503
5. LIBEL AND SLANDER—PLEADING—FALSITY. If matter published is libelous *per se*, it is not incumbent upon plaintiffs to allege its untruth; but, under Rem. & Bal. Code, § 293, that is a matter of defense which must be alleged and proven, in order to be available as such. *Wilson v. Sun Publishing Co.* 503
6. SAME—ACTIONS—PARTIES. A publication touching partnership business may be libelous without mentioning the names of the individual partners, where, by designating the business name under which the plaintiffs operated, the article had just as damaging an effect upon the partnership business as if it had mentioned the names of the partners. *Wilson v. Sun Publishing Co.* 503
7. SAME—EVIDENCE—ADMISSIBILITY. In an action for libel charging that defendant's untrue publications had injured the business of plaintiffs, evidence of what plaintiffs paid for the business and what they sold it for was inadmissible for the purpose of showing damages suffered. *Wilson v. Sun Publishing Co.* 503
8. SAME—ACTION—EVIDENCE. In an action for civil libel instituted by partners for damages to their partnership business, evidence of injury to the reputation and feelings of either partner as an individual is inadmissible. *Wilson v. Sun Publishing Co.* 503
9. SAME—DAMAGES—NOMINAL DAMAGES. In an action for libel to recover upon a publication libelous *per se*, the plaintiff is entitled to

LIBEL AND SLANDER—CONTINUED.

nominal damages, although there may have been a failure of proof of damages, where the verdict of the jury on conflicting evidence finds that the charges were untrue. *Wilson v. Sun Publishing Co.* . . . 503

10. **SAME—ACTUAL DAMAGES—SUFFICIENCY OF EVIDENCE.** In an action for civil libel in publishing untrue articles respecting plaintiffs' restaurant, proof of actual damages occasioned thereby to plaintiffs' business was not established by evidence showing a diminution of patronage, where it appears that plaintiffs' own books showed a steady falling off, beginning prior to the articles and continuing thereafter at about the same ratio, that several competing restaurants had been established in the neighborhood during the period of the decline of plaintiffs' business, and there was no more than vague testimony touching a few isolated instances of desertion by patrons because of the articles, constituting no more than a scintilla of evidence of damages reasonably traceable to the publication. *Wilson v. Sun Publishing Co.* 503
11. **LIBEL AND SLANDER—ACTION—INSTRUCTIONS.** In an action for libel brought by a partnership, it is error to instruct the jury to find for plaintiffs, if the articles published were calculated to injure the plaintiffs either in their reputation or in their business, by exposing them or either of them to ridicule or contempt, or injuriously affect the reputation of either of them in the community, when there was little evidence of injury to the reputation of either partner, and no evidence of injury to the separate business of either, and the only damages recoverable would be by the partners in their joint capacity. *Wilson v. Sun Publishing Co.* 503

LIENS:

See **MECHANICS' LIENS.**

Judgment, see **JUDGMENT.**

LIFE INSURANCE:

See **INSURANCE, 3-13.**

LIMITATION:

Of assessment to estimated cost of improvement, see **MUNICIPAL CORPORATIONS, 11, 14.**

LIMITATION OF ACTIONS:

Enforcement of judgment, see **JUDGMENT.**

1. **LIMITATION OF ACTIONS—CONSTRUCTION—ESTOPPEL.** Debtors primarily liable on an account, which they induced the creditor to assign to their agent for collection for the purpose of suing one secondarily liable thereon for the benefit of the creditor as well as themselves, are estopped to invoke the statute of limitations in an action against them by the creditor, where the original debtors had

LIMITATION OF ACTIONS—CONTINUED.

promised to pay as soon as suit against the secondary debtors was over regardless of the outcome, and thereby induced the creditor to delay enforcement of his claim, and thus wrongfully obtained an advantage which equity will not allow them to hold; especially where the suit against the party secondarily liable was undetermined and not subject to the plea of the statute. *Kretelsheimer v. Gill*..... 175

LIS PENDENS:

1. LIS PENDENS—FILING OF NOTICE—EFFECT—SUBSEQUENT RECORD OF INSTRUMENTS. Under Rem. & Bal. Code, § 243, which provides that a *lis pendens* notice shall, from the time of the filing only, "be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action," delay in recording a conveyance until after the filing of a *lis pendens* notice would not affect the substantive rights of the parties in the property in controversy; since the statute is merely a law of procedure, and goes no further than to make the decree, if ultimately rendered in favor of the plaintiff, effective against one whose conveyance is recorded after the filing of the *lis pendens*, "to the same extent as if he were a party to the action." *Merrick v. Pattison*..... 240

LOCATION:

Of mining claims, see MINES AND MINERALS.

LOST INSTRUMENTS:

1. LOST INSTRUMENTS—EVIDENCE—SUFFICIENCY. The proof to establish a lost written instrument must be clear and positive. *Neill v. Griner* 329
2. LOST INSTRUMENTS—LOST DEEDS — EVIDENCE — SUFFICIENCY. The rule that one who relies upon a lost deed to sustain his title must establish the original existence of the deed, its loss, and the material parts thereof by convincing evidence is met by the affidavit of the grantor setting forth that a quitclaim deed was executed and delivered by him to plaintiff's grantor, describing the property, the kind of deed, and the consideration therefor, which affidavit was corroborated by evidence showing that plaintiff's grantor and plaintiffs regularly paid the taxes each year thereafter, that the quitclaim was given to the holder of a mortgage for \$500 on the land in consideration of that debt and the payment of \$25 additional, and that the land at the time of the quitclaim deed was worth only \$400; although defendant testified that the \$25 was given as earnest money on an agreement to pay \$1,200 therefor, and that no part of the mortgage debt has ever been paid. *Margett v. Wilson*..... 98

MALICE:

As element of libel in civil action, see **LIBEL AND SLANDER**, 4.
In prosecution of action, see **MALICIOUS PROSECUTION**, 2, 3.

MALICIOUS PROSECUTION:

1. **MALICIOUS PROSECUTION—CRIMINAL RESPONSIBILITY—REQUISITES OF INFORMATION—CERTAINTY.** Under Rem. & Bal. Code, § 2369, making it a felony to maliciously and without probable cause cause the arrest of another for a felony, and making it a misdemeanor to so cause the arrest of another for a misdemeanor, an information charging a malicious prosecution without specifying the charge on which the arrest was made is fatally defective, in that it charges two offenses, if any, in violation of Id., § 2059, and also in that it fails to comply with § 2057, providing that an information must be direct and certain as regards the crime charged. *State v. Smith*..... 352
2. **MALICIOUS PROSECUTION—MALICE—BURDEN OF PROOF.** In an action for damages for malicious prosecution, proof of the discharge of plaintiff by the committing magistrate, is only *prima facie* evidence of want of probable cause, and does not shift the burden of proof as to malice; hence, where the plaintiff fails to establish malice, the defendant is entitled to a directed verdict in his favor. *Saunders v. First National Bank of Kelso*..... 125
3. **MALICIOUS PROSECUTION—MALICE—EVIDENCE—SUFFICIENCY.** Malice in causing the arrest for grand larceny of one who persisted in attempting to remove mortgaged chattels from the state, after notice by the mortgagee to desist, is not sufficiently shown, in an action for malicious prosecution, by the presumption of want of probable cause from the dismissal of the suit, where the plaintiff testified there was no ill-feeling at the time the notice was given, and the only other evidence of malice was a letter of subsequent date showing some feeling against attorneys for the plaintiff. *Saunders v. First National Bank of Kelso*..... 125

MANDAMUS:

To compel compliance with orders of public service commission, see **TELEGRAPHS AND TELEPHONES**.

1. **MANDAMUS—PROCEEDINGS—QUESTIONS PRESENTED.** In an action of mandamus to compel the superior court to proceed with the trial of a divorce suit, which the court was refusing to do because of the husband's failure to comply with an order for the payment of alimony *pendente lite*, matters pertaining to the financial ability of the husband, the motives of the wife, and kindred questions, will not be reviewed. *State ex rel. Crombie v. Superior Court* 607

MASTER AND SERVANT:

Enjoining interference with employees, see **INJUNCTION**.

Liens for labor and materials, see **MECHANICS' LIENS**.

1. **MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE TO WORK—QUESTION FOR JURY.** Under the rule that where the servant proceeds to work in a given environment, under a direct order from the master or the master's representative, he does not assume the risks of any dangers not so open and apparent as to be detected by ordinary observation, and that it is a nonassignable duty of the master to see that lumber is piled in such a manner as to make the place reasonably safe for an employee directed to handle it, there was sufficient evidence to present a question for the jury, where it appeared that lumber was piled between decks on a vessel in tiers extending from the deck floor to the top of the compartment, about five feet, nine inches in height; that plaintiff was directed to assist in removing the balance of the timber after the lumber was nearly all out of the ship; that the tiers were apparently straight up and down and plaintiff noticed no danger, although an experienced man in handling lumber; that after two or three boards had been removed from the top of the tier and while plaintiff was at the joint of that tier with another tier, the latter fell, and in attempting to step backward out of the way he was caught by the tier behind him, falling and breaking his leg; there being a dispute upon the facts as to whether the lumber might be safely loaded the way it was, or whether it should have been tied together with cross-strips. *Holmes v. Strong* 7
2. **MASTER AND SERVANT—INJURIES TO SERVANT—PROXIMATE CAUSE—INSTRUCTIONS.** An instruction in an action for negligence which charges the jury that if they find that the lumber upon which plaintiff was working was piled in a careless and negligent manner, and that it fell upon him without any fault on his part and he did not know of the danger he was in, and if he acted as an ordinary prudent man would have acted under the same circumstances, then their verdict should be for the plaintiff, is not prejudicially erroneous in failing to state that the defendant's negligence must be the proximate cause of the injury, where the plain inference is that, if by reason of defendant's negligence the lumber fell and injured him, he was entitled to recover. *Holmes v. Strong*..... 7
3. **MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANTS—SUFFICIENCY OF EVIDENCE.** An employee injured while unloading machinery from a car, due to the carelessness of another employee in not securely fastening pieces remaining after the removal of an outside piece, cannot recover on the ground that a fellow employee was selected by the master as its representative and that he allowed the place to become unsafe, where it appears that the work was not out of the ordinary and was commonly performed without direct supervision; that there was no hidden danger and plaintiff had been

MASTER AND SERVANT—CONTINUED.

engaged in similar work and was not working under the supervision of his fellow employee, both being employed as common laborers at the same wages; and the order of the foreman given to unload the cars was directed to the one as much as to the other. *Beck v. International Harvester Co. of America*..... 413

4. **SAME—VICE PRINCIPAL.** The fact that a fellow servant, in the progress of work in the same common employment, assumes to give directions to other fellow servants necessary to secure concert of action and facilitate the work, does not elevate him into the position of a vice principal. *Beck v. International Harvester Co. of America* 413

5. **MASTER AND SERVANT—INDEPENDENT CONTRACTOR—LIABILITY OF PRINCIPAL.** A subcontractor sustains the relation of an independent contractor, for whose negligence in injuring third persons the principal contractor would not be liable, where he was employed by a building company to do the excavation work necessary for the construction of a building, no control was exercised over the manner of doing the work, he used his own equipment, employed and paid his own men, and the work was not so intrinsically dangerous as to probably result in injuries to third persons, and a reservation by the employer of the right to supervise the work for the purpose of determining whether it is being done in accordance with the contract does not affect the independence of the relation. *Johnston v. Seattle Taxicab & Transfer Co.*..... 551

6. **SAME—RELATION—INDEPENDENT CONTRACTOR—NEGLIGENCE—PARTIES LIABLE.** A superintendent employed by a building company, whose duties did not begin until after excavation therefor was completed, is not liable for injuries received by reason of the negligence of a subcontractor in doing the excavation work. *Johnston v. Seattle Taxicab & Transfer Co.*..... 551

MATERIALITY:

Of variance, see **PLEADING**, 2.

MATERIALMEN:

Notice to owner of material furnished for building, see **MECHANICS' LIENS**.

MEASURE OF DAMAGES:

See **DAMAGES**.

For obstructing water course, instructions, see **WATERS AND WATER COURSES**, 7.

MECHANICS' LIENS:

Priority of over conditional sale contract, as deprivation of property without due process of law, see **CONSTITUTIONAL LAW**, 5, 6.

MECHANICS' LIENS—CONTINUED.

1. **MECHANICS' LIENS—NOTICE TO OWNER—STATUTE—SUFFICIENCY OF EVIDENCE.** Under 3 Rem. & Bal. Code, § 1133, providing that every person furnishing material or supplies to be used in the construction of a building shall, within five days after such material or supplies are delivered to any person or contractor, "deliver or mail" to the owner a duplicate statement of all such materials, compliance with the requirement of mailing notice is inferentially established by testimony of plaintiff's secretary that, while he could not swear positively that the street address had been placed upon the envelope, he believed it was, basing his opinion on the fact that, on the carbon copy of the notice of statement in evidence, he had made a memorandum "Mail to E. 525 Sinto, Spokane," which he thought he must have done at the time he wrote the address on the envelope; since, in the absence of conflicting evidence, the question is, what is the inference to be drawn from the undisputed testimony. *Hillyard Lumber Co. v. Codd*..... 612
2. **MECHANICS' LIENS — MATERIALMEN — NOTICE—STATUTE—"AGENT."** Under 3 Rem. & Bal. Code, § 1133, requiring, in order to obtain a mechanics' lien, the giving of written notice to the owner of the building of the furnishing of any materials or supplies, within five days after the first delivery of such material "to any contractor or agent," the term "agent" must be construed as meaning agent of the owner and not of the contractor; and includes a lessee in possession under obligation to make the improvements, as agent of the owner. *Hays v. Montesano Mill Co.*..... 604

MINES AND MINERALS:

1. **MINES AND MINERALS — ASSESSMENT WORK — RELOCATION — RIGHT TO.** A relocation of a group of mining claims, on the theory that they had been abandoned or forfeited because assessment work for the prior year had not been done on the claims, is invalid, where, prior to the filing of the relocation notice, the original holder had resumed operations by building and improving trails and roads for the better development of the mine, and was furnishing and moving donkey engines and other material for the purpose of facilitating mining operations for which expenditures had been made in excess of the sums required for assessment work on the claims, although said expenses incurred were not within the boundaries of its claims, and would also inure to the benefit of a railroad project in connection with the mines. *Florence-Rae Copper Co. v. Kimbel*..... 162
2. **MINES AND MINERALS—RELOCATION—NOTICES.** Under Rem. & Bal. Code, § 7365, providing that upon "the relocation of forfeited or abandoned quartz or lode claims, . . . a new location monument shall be erected and the location certificate shall state if the whole or any part of the new location is located as abandoned property," the relocation notice posted upon a claim alleged to be for-

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feited is invalid where it fails to state that it is located in whole or in part upon forfeited or abandoned ground; the term "abandoned" in the latter part of the act being used synonymously and interchangeably with the terms "forfeited or abandoned" as used in the first part of the act; and it is not sufficient that the certificate to be recorded under § 7358 states the fact as to abandonment. *Florence-Rae Copper Co. v. Kimbel*..... 162

3. **MINES AND MINERALS—MINING CLAIMS—FORFEITURE.** Under U. S. Rev. Stat., § 2324, providing that, upon failure to do annual assessment work, a mining claim shall be open to relocation, provided the original locators, or successors in interest, have not resumed work upon the claim after failure and before such relocation, a forfeiture does not ensue from the mere failure to comply with the law, but resumption of work at any time prior to the lawful inception of an intervening right would prevent forfeiture, and a forfeiture will not be declared except on clear and convincing proof with every reasonable doubt resolved against a forfeiture. *Florence-Rae Copper Co. v. Kimbel* 162

MISREPRESENTATION:

See **FRAUD**.

Inducing exchange of property, see **EXCHANGE OF PROPERTY**, 4, 5.

As ground for rescission of assignment of patent, see **PATENTS**.

Inducing sale, see **SALES**, 1-3.

By vendor in sale of land, see **VENDOR AND PURCHASER**, 2, 3.

MISTAKE:

Mutual mistake in contract for exchange of property, see **EXCHANGE OF PROPERTY**, 1.

Of jury in returning verdict, see **TRIAL**, 5.

MONOPOLIES:

Grants of privileges or immunities, see **CONSTITUTIONAL LAW**, 4.

MORTGAGES:

False certificate of acknowledgment by notary, see **ACKNOWLEDGMENT**.

Personal property, see **CHATTEL MORTGAGES**.

Subrogation to rights of mortgagee, see **SUBROGATION**, 2.

1. **MORTGAGES—ABSOLUTE DEED AS MORTGAGE—EVIDENCE.** When property has been conveyed by a deed absolute in form, without any contract of defeasance or other written instrument showing that it was intended as a mortgage, the contention that it was intended as a mortgage required clear, convincing and cogent evidence to uphold it. *Nutter v. Cowley Investment Co.*..... 207

MOTIONS:

Direction of verdict in civil actions, see **TRIAL**, 3.

Change of venue in civil actions, see **VENUE**.

MOTOR VEHICLES:

Law regulating operation of, see **STATUTES**, 11-13.

MUNICIPAL CORPORATIONS:

Damage to property by operation of railroad through city, see **RAILROADS**.

Laws prohibiting diversion of special funds as temporary loan, see **STATUTES**, 1, 9.

Street railroads, see **STREET RAILROADS**.

Liability of railroad company in obstructing stream by change of street grade, see **WATERS AND WATER COURSES**.

1. **MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—CONTRACTS—BOND OF CONTRACTOR—LIABILITY—SUPPLIES.** A bond given by a contractor to secure payment of laborers and materialmen upon public work and all persons who shall furnish the contractor with "provisions and supplies" for the carrying on of said work, in compliance with Rem. & Bal. Code, § 1159, covers sums due for the rental of a donkey engine furnished to the contractor on city street improvement work. *National Lumber & Box Co. v. Title Guaranty & Surety Co.* 660
2. **MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE.** While the owner of property in a municipality whose streets have been dedicated to a public use cannot complain of an initial or original grade, since it is conclusively presumed that it was intended by the dedicator that the streets should be made suitable for public convenience, grades made necessary by the building of commercial railways cannot be said to fall within the grant, such use being adverse to, and not within, the contemplated use. *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.* 395
3. **MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—STATUTORY PROVISIONS.** In making local improvements, the general rule that a city must follow the letter of the law, construed strictly against the city does not obtain, in view of 3 Rem. & Bal. Code, § 7892-69, providing that the statute is to be liberally construed for the purpose of carrying out the object for which the act is intended. *Buck v. Monroe* 1
4. **MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REMONSTRANCE—STATUTES.** Under 3 Rem. & Bal. Code, § 7892-66, providing that no ordinance for a local improvement shall be effective over the written objection of the owner of a majority of the property affected filed with the clerk "prior to the final passage of such ordinance, unless such ordinance shall receive an affirmative vote of at least two-thirds of all the members of the council or other legislative body of such city or town," it is not necessary for the council to take direct action upon the remonstrance, since the passage of the ordinance by a two-thirds vote subsequent to a hearing of the remonstrance is practically a rejection thereof and a passage of the ordinance by the required vote. *Buck v. Monroe* 1

MUNICIPAL CORPORATIONS—CONTINUED.

5. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — STREET INTERSECTIONS—POWERS OF COUNCIL. Under 3 Rem. & Bal. Code, § 7892-55, which provides that there shall be included in the cost of a local improvement assessed against property specially benefited the cost of that portion of the improvement included within the limits of any street intersection, the city may include the whole or a part of the intersections to be taxed against the property benefited, or may pay for the whole or a part of such intersections out of its general fund. *Buck v. Monroe*..... 1
6. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—RECORD — VOTE OF COUNCIL. The record on the passage of an ordinance reciting that "the roll was then called on the passage of the ordinance and resulted in all members of the council voting 'Yea' except H., who was absent," sufficiently shows that four of the five councilmen voted for its passage, and hence is not open to the objection that it does not affirmatively appear that it was passed by the necessary two-thirds vote. *Buck v. Monroe*..... 1
7. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — ASSESSMENT DISTRICTS. The fact that a city makes an improvement district including several streets and blocks is not a violation of a charter provision limiting assessment districts to within 150 feet of the side lines of the street improved, where, by a proper system of bookkeeping, property was assessed with reference only to the street lying within 150 feet of the particular lot assessed. *Gerlach v. Spokane* 129
8. SAME. Under Const., art. 7, § 9, which provides that "the legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited," and under Rem. & Bal. Code, § 7790, which provides that "no property shall be assessed a greater amount than it will be actually benefited," there can be no special assessment to pay for a thing which has conferred no special benefit on the property assessed, and hence general benefits cannot be made the basis of a levy. *In re Shilshole Avenue*..... 522
9. SAME—PUBLIC IMPROVEMENTS—ASSESSMENT OR GENERAL TAXATION. The establishment of a county canal flooding certain city streets and abutting lots, as a general public improvement, does not prevent the assessment of the same property for the purpose of elevating the grades of the streets above the water level, as a local improvement, on the theory that the raising of the grades was necessitated by a general public improvement as distinguished from a local improvement and that its expense was one which should be borne by general taxation. *In re Shilshole Avenue*..... 522
10. SAME—ASSESSMENTS—SPECIAL BENEFITS. An assessment for a local improvement by elevating the grade of streets, should be set

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aside as made upon a fundamentally wrong basis, where the lower court found that a potential flooding of the district for a county canal required elevation of the streets but slightly above water level which would be a benefit to the property, but that it would not be a benefit to raise them, as proposed in the present proceedings, to a height of nine feet above the water level; and after awarding damages for such excessive elevation, proceeded to assess the property for the amount of such damages, in addition to an assessment for the slight elevation necessary to make them dry and usable; since there was no relation between the benefits to the benefited property and the damages to the damaged property, and the thing which conferred the benefit did not inflict the damage; and it is immaterial that both were parts of one improvement. *In re Skishole Avenue* 522

11. SAME — ASSESSMENTS — OBJECTIONS — WAIVER — JURISDICTIONAL QUESTIONS. Where a local improvement was made by a third-class city under Rem. & Bal. Code, § 7705, which limited the city's power of assessment to an amount equal to the estimated cost of the improvement, the failure of property owners to object at certain stages of the proceedings does not preclude them from raising the jurisdictional objection that the assessment exceeded the cost of the improvement; especially where, by 3 Rem. & Bal. Code, §§ 7892-42, 7892-43, the property owners were only permitted to raise objections to the existence and amount of the benefits. *Kuehl v. Edmonds* 307
12. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—UNEQUAL ASSESSMENTS. The assessment of lots within an assessment district at the ratio of fifty per cent for the first lot, thirty per cent for the next, and twenty per cent for the succeeding one, does not raise a conclusion of law that the property is not assessed according to relative benefits, since the presumption is that the improvement is a benefit and the assessment fair; and the burden is upon the property owner to establish otherwise. *Gerlach v. Spokane* 129
13. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—ADDITIONAL ASSESSMENTS. The exemption of certain lots within a street assessment district from levy for the building of a drainage system included in the improvement was proper, where the cost of drainage had theretofore been assessed against them, they were not in the same relative situation as the lots assessed, and the improvement was not essential to their use and enjoyment. *Gerlach v. Spokane* 129
14. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—LIMITATIONS—ESTIMATED COST—REASSESSMENT—POWER OF CITY AND LEGISLATURE—REPEAL OF LAW—EFFECT. Where a local improvement was made by a third-class city, under Rem. & Bal. Code, § 7705, limiting

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- the city's power of assessment to an amount equal to the estimated cost, the property owner may rely thereon as a limitation on the jurisdiction of the city, and the legislature cannot, by a subsequent act, repeal the limitation as to improvements already made; hence the act of 1911, 3 Rem. & Bal. Code, §§ 7892-42, 7892-43, repealing § 7705 and authorizing the city to make supplemental or reassessments to cover the actual cost of the improvement can have no application to an improvement previously made under the limitation of § 7705, and confers no power on the city to reassess for any sum in excess of the estimate. *Kuehl v. Edmonds*..... 307
15. SAME—CURATIVE ACTS. Authority to make a reassessment under such act cannot be sustained on the theory of the power to pass curative acts, since there was no invalidity within the limitation, which subsequent legislation could not change after it had been acted upon by both the city and the property owner. *Kuehl v. Edmonds*... 307
16. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—FINDINGS OF COURT—REVIEW. The findings of the superior court made upon attacking the assessment roll for a local improvement in eminent domain proceedings by cities, in the absence of exceptions, are conclusive on appeal, in view of Rem. & Bal. Code, § 7795, providing that the hearing shall be conducted as in other cases at law tried by the court, and findings made thereon and judgment entered accordingly. *In re Shilshole Avenue*..... 522
17. SAME—ASSESSMENTS—REVIEW—NECESSITY OF APPEAL. The final judgment of the lower court in passing upon the assessment roll in condemnation proceedings being conclusive upon all who are content to accept it, the reversal of such judgment on appeal and cancellation of assessments therein decreed affects only the property of the parties to the appeal. *In re Shilshole Avenue*..... 522
18. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—APPEAL—EQUITABLE RELIEF. Under the eminent domain act of 1907 (Rem. & Bal. Code, § 7768 *et seq.*), governing condemnation proceedings by cities, which provides that the assessment roll shall be heard before the superior court as a court of first instance, and under Rem. & Bal. Code, § 7797, which provides that "the judgment of the court shall have the effect of a separate judgment as to each tract or parcel of land or other property assessed, and any appeal from such judgment shall not invalidate or delay the judgment except as to the property concerning which the appeal is taken," such judgments are final and can be corrected only on appeal or by statutory proceedings on motion or petition within one year of their entry; hence property owners, who failed to appeal or to institute proceedings within one year to vacate or modify the judgment, cannot subsequently by action in equity obtain the same relief accorded to prop-

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- erty owners who had appealed and thereby secured a reduction of their assessments. *Strelau v. Seattle*..... 255
19. MUNICIPAL CORPORATIONS—ASSESSMENTS—REVIEW—REVERSAL. Under Rem. & Bal. Code, § 7797, of the statute governing the exercise of the power of eminent domain by cities, which provides that a judgment confirming an assessment roll "shall have the effect of a separate judgment as to each tract or parcel of land or property assessed, and any appeal from such judgment shall not invalidate or delay the judgment except as to the property concerning which the appeal is taken," property owners who fail to appeal from an assessment, or, having appealed, waive their appeal, are not entitled to take advantage of a reversal of the order confirming the assessment roll; since the final judgment of the lower court confirming the assessment is conclusive upon all who are content to accept it, in view of Rem. & Bal. Code, § 7995, which provides that "as to all property to the assessment of which objections are not filed as herein provided, default may be entered and the assessment confirmed by the court." *In re West Wheeler Street*..... 146
20. MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—LIABILITY. In an action for injuries received by driving an automobile into a gulch across one of the city streets, there was sufficient evidence to present the question of the city's negligence to the jury, where it appeared that a gulch thirty feet deep and eighty feet wide crossed such street, but that the lighting of the streets on each side of the gulch gave the impression of a continuous street; that there was no barrier, or danger signal or light near the gulch, except an ordinary incandescent light on a telegraph pole, which tended rather to obscure than disclose the gulch, and in the obscurity the ravine presented the appearance of a continuation of the unpaved portion of the street. *Beach v. Seattle*..... 379
21. MUNICIPAL CORPORATIONS—INJURIES TO PERSONS ON STREETS—NEG-
LIGENCE—EVIDENCE. The driver of an automobile colliding with a boy is not shown to be guilty of negligence, when the evidence shows that he was proceeding on a business street at a rate of from six to ten miles per hour, and that the boy, running diagonally across the street, suddenly darted in front of his machine, and that, after striking the boy, he stopped the automobile within a very few feet. *Daugherty v. Metropolitan Motor Car Co.*..... 105
22. MUNICIPAL CORPORATIONS—INJURIES TO PERSONS ON STREETS—LAST
CLEAR CHANCE. The doctrine of last clear chance does not apply in case of a pedestrian run down by an automobile, where the driver did not see the pedestrian until the latter, while running, was about to collide with the machine, and where he did everything that could be done, such as turning to one side, to avoid the accident. *Daugherty v. Metropolitan Motor Car Co.*..... 105

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23. MUNICIPAL CORPORATIONS—OBSTRUCTIONS IN STREET—PERSONAL INJURIES—PROXIMATE CAUSE. In an action for injuries to a passenger in a taxicab when it collided with a drag unlawfully used in the street by a building contractor without any permit, the question of whether the unlawful use of the drag was the proximate cause of the injury was for the jury. *Johnston v. Seattle Taxicab & Transfer Co.* 551
24. MUNICIPAL CORPORATIONS—CITY WHARF—PERSONAL INJURY—QUESTION FOR JURY—NEGLIGENCE. Whether a city was negligent in maintaining a wharf made up of two floats placed end to end, about one and one-half feet apart, with an apron or platform connecting the two floats, leaving an open space, which in the nighttime was not readily observable by reason of the shadow of a pile thrown upon it, presents a question for the jury, where a ferryman, who had never before been upon the wharf, but knew the general manner of its construction, fell into the open space thus cast in shadow. *Harris v. Bremerton* 64
25. SAME—WHO ARE TRESPASSERS. The fact that a ferryman operating a launch for hire had not paid the wharfage license required by the city would not render him a trespasser in the use of a wharf at which he landed, to the extent of depriving him of the right of protection against personal injuries received through the city's negligence in maintaining the wharf in a dangerous condition. *Harris v. Bremerton* 64
26. MUNICIPAL CORPORATIONS—INJURIES TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—RIGHT OF WAY. A pedestrian, struck down by an automobile upon a street crossing where, by ordinance, she had the superior right of way, cannot be said, as a matter of law, to have been guilty of contributory negligence in not continuously observing the approach of the automobile, which she perceived a block away and thereafter paid no attention to it when she started to cross a well-lighted street, where her view was not obstructed by the presence of other vehicles, she having a right to assume that the driver would approach at a lawful rate of speed, that he would sound some signal of his approach, that he would observe the city ordinance and state statute as to speed at street crossings prohibiting a speed in excess of four miles an hour when any person was on the crossing, and that he would heed the pedestrian's superior right on the crossing by changing his course or actually stopping. *Johnson v. Johnson* 18
27. MUNICIPAL CORPORATIONS—USE OF STREETS—COLLISIONS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether an automobile colliding with a pedestrian on a street crossing without sounding a warning, was making noise sufficient to advise of its approach, and whether the average person accustomed to the usual street noises could have consciously heard and heeded the noise of the moving

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- machine, are questions for the jury, where the evidence was conflicting on the point that considerable noise was made by the automobile as it approached the crossing where it ran over the pedestrian. *Johnson v. Johnson*..... 18
28. SAME—CONTRIBUTORY NEGLIGENCE—FORGETFULNESS OF HIDDEN DANGER. The fact that the person injured had knowledge of the manner of construction of the wharf would not as a matter of law constitute contributory negligence, when the danger was so hidden as not of itself to be a reminder of its existence to one coming within its presence. *Harris v. Bremerton*..... 64
29. MUNICIPAL CORPORATIONS—STREETS—CONTRIBUTORY NEGLIGENCE. In an action for personal injuries, the negligence of plaintiff was the proximate cause of his injuries, where it appears from the evidence that he was a newsboy fourteen years of age, accustomed to being on the business streets, and had been selling papers for a year at one of the busiest street corners; that on hearing the whistle of the paper distributor, he darted up and ran towards him diagonally across the street, some distance south of the street crossing; that the driver of the automobile was driving slowly with the machine under control, and did not see the boy until he was almost against the machine. *Daugherty v. Metropolitan Motor Car Co.*..... 105
30. MUNICIPAL CORPORATIONS—INJURIES FROM DEFECTIVE STREET—EVIDENCE—SIMILARITY OF CONDITIONS. In an action for injuries received from driving an automobile into a gulch crossing a city street, on account of the unguarded and deceptive condition of the street, evidence as to the condition of the street some eight months after the injury was not error, where the comparative conditions of the street were not materially changed, and on the subsequent date, an auto truck, on a similar dark night, and with a headlight illuminating the roadway for about the same distance as the other machine, was driven over the same course and the gulch was not discovered by the driver until his front wheels went over the edge. *Beach v. Seattle* 379
31. MUNICIPAL CORPORATIONS—INJURIES TO PEDESTRIAN—ACTIONS—INSTRUCTIONS. In an action for injuries to a pedestrian struck by a motor truck, in which the plaintiff's evidence showed that he was struck in the middle of the street and the truck was not where it should have been in compliance with ordinance regulations, while defendant's evidence showed that the truck was being driven as near the right-hand curb as possible, going in the direction it was, an instruction was not erroneous as determining the defendant's negligence through violation of the ordinance as to the use of the street as a matter of law, where it charged the jury that, if they find that plaintiff "had reached a place in the street where, if the defendant had operated its motor truck in accordance with the pro-

MUNICIPAL CORPORATIONS—CONTINUED.

visions of the city ordinance, he would have been out of the danger zone, then his failure to look north at the time when he started to cross the street would not preclude a recovery, because of his right to rely upon the use of the street by defendant in a lawful manner, and of his right to expect the automobile truck to be in a place where under the ordinance it had a right to be." *Mosso v. Stanton Co.* 499

MUTUAL BENEFIT INSURANCE:

See **INSURANCE**, 3-13.

NAMES:

Filing designation of firm, see **PARTNERSHIP**, 3.

NAVIGABLE WATERS:

1. **NAVIGABLE WATERS — COMMERCIAL WATERWAY DISTRICTS — ESTABLISHMENT—PETITION.** A petition for the establishment of a commercial waterway district cannot be attacked because not signed by the wives of petitioners owning community lands in the district, where the wives signed and acknowledged a statement that their husbands had been given prior authority to sign the petition and to represent their interests in the proceedings; as the same shows both previous authority and subsequent ratification. *Jackson v. Commercial Waterway District No. 1, of Pierce County* 301

NECESSITY:

Of exceptions for purpose of review, see **APPEAL AND ERROR**, 5, 7.
Of appeal from proceedings attacking assessment roll, see **MUNICIPAL CORPORATIONS**, 17-19.

NEGLIGENCE:

- Measure of damages, see **DAMAGES**.
Cause of explosion, see **EXPLOSIVES**.
Failure to keep highway in repair, see **HIGHWAYS**.
Of traveler injured on highway, see **HIGHWAYS**, 4.
Of notary, liability of community for, see **HUSBAND AND WIFE**, 1.
Of independent contractor, see **MASTER AND SERVANT**, 5, 6.
Of person injured on street, see **MUNICIPAL CORPORATIONS**, 26-29.
Of driver of automobile, see **MUNICIPAL CORPORATIONS**, 21, 26, 27, 29, 31.
Of bailee of scow, see **SHIPPING**.
In operation of street car, see **STREET RAILROADS**.
Instructions as to burden of proof to rebut presumption of, see **TRIAL**, 8.
In obstructing water course, see **WATERS AND WATER COURSES**, 4.
1. **NEGLIGENCE—IMPUTED NEGLIGENCE—DRIVER OF VEHICLE.** Contributory negligence of the driver of an automobile in exceeding the speed 25—85 **WASH.**

NEGLIGENCE—CONTINUED.

limit is not imputable to an invited guest, who was not in a position to exercise some control over the driver, had no reason to believe the driver was careless or incompetent, did not appreciate that the speed was dangerous, and was unfamiliar with the streets over which she was riding. *Beach v. Seattle*..... 379

2. **NEGLIGENCE — CONTRIBUTORY NEGLIGENCE.** When the defendant's negligence is the proximate cause of the injury for which action is brought, while that of plaintiff is only a mere condition and not an efficient cause of the injury, plaintiff's contributory negligence would not defeat recovery. *Johnson v. Johnson*..... 18

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES.**

NEWLY DISCOVERED EVIDENCE:

Ground for new trial in civil actions, see **NEW TRIAL.**

NEWSPAPERS:

Libel, see **LIBEL AND SLANDER**, 2-11.

NEW TRIAL:

Review of rulings on as dependent on presentation of same by record, see **APPEAL AND ERROR**, 16.

Review of discretion in ruling on motion for, see **APPEAL AND ERROR**, 23.

As remedy for error of jury in returning verdict, see **TRIAL**, 5.

1. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.** A new trial on the ground of newly discovered evidence is properly denied, where the evidence consisted of the testimony of an attorney who had represented defendants in a transaction involving the question of agency in the case and afterwards removed from the city, and which was as much in their power to produce at the time of the trial as it would be in case of a new trial. *Burwell & Morford v. Barnes* 153

NONSUIT:

Waiver of error in denial of motion for, see **APPEAL AND ERROR**, 24.

NOTARIES:

See **ACKNOWLEDGMENT.**

Evidence of care in discharging duties, in action for negligence of, see **EVIDENCE**, 1.

Liability of community for negligence of notary, see **HUSBAND AND WIFE**, 1.

NOTES:

Promissory notes, see **BILLS AND NOTES.**

NOTICE:

- See *LIS PENDENS*.
- Of appeal, see *APPEAL AND ERROR*, 8, 9.
- To indorser as affecting indorsee as *bona fide* holder of check, see *BILLS AND NOTES*, 5.
- Knowledge by payee of fraud in execution of notes, see *BILLS AND NOTES*, 12.
- Record of mortgage as notice, see *CHATTEL MORTGAGES*.
- Corporate officers, see *CORPORATIONS*, 3.
- To owner of furnishing of materials, see *MECHANICS' LIENS*.
- Relocation of mining claim, see *MINES AND MINERALS*, 1, 2.
- Purchaser of real property, see *VENDOR AND PURCHASER*, 4.

OBJECTIONS:

- Necessity for purpose of review, see *APPEAL AND ERROR*, 3.
- To evidence for purpose of review, see *CRIMINAL LAW*, 3.
- To depositions, see *DEPOSITIONS*.
- To public improvement, see *MUNICIPAL CORPORATIONS*, 4.
- To assessment for public improvements, see *MUNICIPAL CORPORATIONS*, 11.
- To instructions, see *TRIAL*, 7.

OBSTRUCTIONS:

- In city street, see *MUNICIPAL CORPORATIONS*, 23.
- Of water course, see *WATERS AND WATER COURSES*.

OFFICERS:

- Corporate officers, see *CORPORATIONS*, 3.

OPINION EVIDENCE:

- Expert testimony as to custom in collection of check, see *BILLS AND NOTES*, 15.

ORAL CONTRACTS:

- See *FRAUDS, STATUTE OF*.

ORDERS:

- Review of, see *APPEAL AND ERROR*, 1, 16.

ORDINANCES:

- Municipal ordinances, see *MUNICIPAL CORPORATIONS*, 4, 6.

ORIGINAL PROMISE:

- To pay for goods sold to another, see *SALES*, 6.

PARENT AND CHILD:

- See *ADOPTION*.

PAROL CONTRACTS:

See FRAUDS, STATUTE OF.

PAROL EVIDENCE:

In civil actions, see EVIDENCE, 2.

PARTIES:

Notice of appeal, see APPEAL AND ERROR, 8, 9.

Accommodation indorsers, see BILLS AND NOTES, 10, 11.

Rights and liabilities as to costs, see COSTS.

Persons entitled to sue for causing death, see DEATH, 2.

Alleging names of in publication touching partnership business, see LIBEL AND SLANDER, 6.

Entitled to fruits of appeal from judgment confirming assessment roll, see MUNICIPAL CORPORATIONS, 17-19.

To contract of sale, see SALES, 4.

Entitled to right of subrogation, see SUBROGATION.

PARTNERSHIP:

Contract for dissolution, see ATTORNEY AND CLIENT.

1. **PARTNERSHIP—EXISTENCE OF RELATION—SHARING EXPENSES.** Where parties entered into a joint venture, upon the understanding that each should pay an equal amount of all the expenses incident to the venture, the conclusion necessarily follows that they would share equally in all the proceeds of the enterprise as partners. *Galbraith v. Devlin* 482
2. **PARTNERSHIP—GOOD FAITH BETWEEN PARTNERS.** Where partners in a group of coal mining claims procured an option on the interest of another partner by falsely representing that they could make a sale at a certain price, concealing from him the situation of affairs probably insuring the realization of a better price for which the sale was in fact made, it is such a fraud as against the partner giving the option as to entitle him to recover his proportionate share of the purchase price which he had not received. *Galbraith v. Devlin* 482
3. **PARTNERSHIP—FICTITIOUS NAME—COMPLIANCE WITH STATUTE—OBJECTIONS.** The objection that a partnership, doing business under an assumed name, cannot maintain an action because it had failed to file with the county clerk the designation of the firm, with the names of all the partners, as required by Rem. & Bal. Code, § 8369, goes only to the capacity to sue, and is waived if not raised by demurrer or answer. *Crozier v. Oudishee*..... 237

PASSAGE:

Of ordinance, see MUNICIPAL CORPORATIONS, 4, 6.

PASTURAGE:

Action for breach of contract to furnish sheep for, see ANIMALS.

PATENTS:

1. **PATENTS—ASSIGNMENT—RESCISSION—FALSE REPRESENTATIONS—KNOWLEDGE.** An assignment of a patent will not be cancelled for false representations by the assignee as to his financial resources for the manufacture of the machines, which was the consideration for the assignment, where his inability to finance the enterprise alone was known to the plaintiff early in their negotiations and before the assignment was made. *Magnusson v. Tanzy*..... 561
2. **PATENTS—ASSIGNMENT—CONSIDERATION—EVIDENCE.** A finding of failure of consideration for assignments of a half interest in two patents is supported by evidence to the effect that the assignment was made on defendant's agreement to manufacture and market the machines at the joint expense of the plaintiff and defendant, and divide the profits, that both contributed in equal amounts to the manufacture of eight machines, and that the defendant thereafter refused to advance any money for the manufacture of machines necessary to protect one of the patents. *Magnusson v. Tanzy*... 561

PAYMENT:

To third party as defense in action on assigned account, see **ASSIGNMENTS**.

Of alimony *pendente lite*, see **DIVORCE**.

Promise to pay debt of another, see **FRAUDS, STATUTE OF**, 1, 2.

Of premium for insurance, see **INSURANCE**, 1.

Promise to pay for goods sold to another, see **SALES**, 6.

Subrogation on payment, see **SUBROGATION**.

PENDENCY OF ACTION:

Effect as to property involved, see **LIS PENDENS**.

PERFORMANCE:

Of contract for dissolution of partnership, see **ATTORNEY AND CLIENT**, 2, 3.

Of contract, see **CONTRACTS**.

Necessity of tender of on breach of contract, see **EXCHANGE OF PROPERTY**, 2, 3.

PERSONAL INJURIES:

See **ASSAULT AND BATTERY; NEGLIGENCE**.

Damages for, see **DAMAGES**.

Caused by explosives, see **EXPLOSIVES**.

To traveler on highway, see **HIGHWAYS**, 3, 4.

To employee, see **MASTER AND SERVANT**, 1-4.

Caused by dangerous condition of city wharf, see **MUNICIPAL CORPORATIONS**, 24, 25, 28.

To person on city street, see **MUNICIPAL CORPORATIONS**, 20-23, 26, 27, 29-31.

PERSONAL INJURIES—CONTINUED.

To passenger in automobile in collision with street car, see **STREET RAILROADS**.

Impeachment of witnesses in action for, see **WITNESSES**, 3.

PERSONAL RIGHTS:

Protection of, see **INJUNCTION**.

PETITION:

For establishment of commercial waterway district, see **NAVIGABLE WATERS**.

PLATS:

Acceptance of by county, effect, see **HIGHWAYS**, 1-3.

PLEADING:

See **LIBEL AND SLANDER**, 5.

In action for breach of contract to furnish sheep for pasturage, see **ANIMALS**.

Amendments on appeal, see **APPEAL AND ERROR**, 25-27.

Demurrer as constituting appearance, see **APPEARANCE**.

On note, see **BILLS AND NOTES**, 12-14.

Amendment of, ground for continuance, see **CONTINUANCE**.

In action for appointment of receiver, see **CORPORATIONS**, 6.

To set aside conveyance in fraud of creditors, see **EXECUTORS AND ADMINISTRATORS**, 1.

Statute of frauds, see **FRAUDS**, **STATUTE OF**, 4.

1. **PLEADING—SURPLUSAGE—TRIAL—OPENING STATEMENT OF COUNSEL.** The fact that plaintiff's complaint and the opening statement of his counsel overstated his case, would not preclude his right of recovery if there were any facts and any theory upon which he was entitled to recover. *Galbraith v. Devlin*..... 482
2. **PLEADINGS—VARIANCE—MATERIALITY.** A variance is not material unless it actually misleads the adverse party to his prejudice in maintaining his action or defense on the merits, and the burden is upon him to show such fact. *German American Bank of Seattle v. Wright* 460

PLEDGES:

Pledge of bank check as collateral security, see **BILLS AND NOTES**, 3, 5-7, 14, 15.

Of corporate bonds, see **CORPORATIONS**, 4.

POLICE POWER:

See **CONSTITUTIONAL LAW**, 2-4.

Exercise of by legislature, see **STATUTES**, 7, 11.

Requiring physical connection of telephone companies, see **TELEGRAPHS AND TELEPHONES**, 3.

POLICY:

Of insurance, see **INSURANCE**, 1, 2.

POSSESSION:

See **FORCIBLE ENTRY AND DETAINER**.

As notice, see **VENDOR AND PURCHASER**, 4.

POWERS:

Of public service commission in regulating public utilities, see **EMINENT DOMAIN**, 1.

Of court to award temporary maintenance and suit money pending action for separate maintenance, see **HUSBAND AND WIFE**, 2.

Of court to appoint guardian for estate of incompetent, see **INSANE PERSONS**, 1.

Of council in charging costs of local improvement, see **MUNICIPAL CORPORATIONS**, 5.

Of city to make reassessment for sum in excess of estimated cost of improvement, see **MUNICIPAL CORPORATIONS**, 14, 15.

Of public service commission to require physical connection of telephone companies, see **TELEGRAPHS AND TELEPHONES**, 5.

Of court to correct own errors, see **TRIAL**, 2.

PRACTICE:

See **APPEAL AND ERROR**; **APPEARANCE**; **COSTS**; **CRIMINAL LAW**; **DAMAGES**; **DIVORCE**; **JURY**; **NEW TRIAL**; **PLEADING**; **TRIAL**.

PREFERENCES:

Of creditors by failing debtor, see **FRAUDULENT CONVEYANCES**, 2.

PREJUDICE:

Ground for reversal in civil actions, see **APPEAL AND ERROR**, 43-54.

Of juror, see **JURY**, 2.

Change of venue for prejudice of judge, see **VENUE**.

PREMIUMS:

For insurance, see **INSURANCE**, 1.

PRESENTMENT:

Of check for payment, see **BILLS AND NOTES**, 4.

PRESUMPTIONS:

On appeal, see **APPEAL AND ERROR**, 25-28.

As to valid delivery of instrument, see **BILLS AND NOTES**, 8.

As to validity of act relating to exercise of police power, see **CONSTITUTIONAL LAW**, 3.

As to validity of law, see **STATUTES**, 1.

As to validity of order of public service commission, see **TELEGRAPHS AND TELEPHONES**, 2.

PRINCIPAL AND AGENT:

Corporate officers and agents, see CORPORATIONS, 3.

Construction of statute requiring notice to owner of furnishing materials to "contractor or agent," see MECHANICS' LIENS, 2.

PRINCIPAL AND SURETY:

Liability of surety on supersedeas bond, see APPEAL AND ERROR, 10-12.

PRIORITIES:

Of mechanics' liens, over conditional sales contract, see CONSTITUTIONAL LAW, 5, 6.

Of claims against insolvent corporations, see CORPORATIONS, 4.

PRIVILEGE:

From liability for slander or libel, see LIBEL AND SLANDER, 1, 2.

PROCESS:

On appeal, see APPEAL AND ERROR, 8, 9.

PROMISE:

To pay debt of another, see SALES, 6; FRAUDS, STATUTE OF, 1, 2.

PROMISSORY NOTES:

See BILLS AND NOTES.

PROPERTY:

See EXCHANGE OF PROPERTY.

Constitutional guaranties of rights of property, see CONSTITUTIONAL LAW, 5-7.

Taking and damaging of, see CONSTITUTIONAL LAW, 7.

Taking or damaging for public use, see EMINENT DOMAIN.

Protection of rights of property by injunction, see INJUNCTION.

Of insane person, appointment of guardian for, see INSANE PERSONS.

Damage to by operation of railroad, see RAILROADS.

Assessment of for taxation, see TAXATION.

Requiring physical connection of telephone companies as taking of property without compensation, see TELEGRAPHS AND TELEPHONES, 4.

PROXIMATE CAUSE:

Of injury to servant, see MASTER AND SERVANT, 2.

Of injury to passenger in taxicab, see MUNICIPAL CORPORATIONS, 23, 29.

Of injury, see NEGLIGENCE, 2.

PUBLICATION:

Of libel, see LIBEL AND SLANDER, 2-11.

PUBLIC IMPROVEMENTS:

By municipalities, see MUNICIPAL CORPORATIONS, 1, 3-19.

PUBLIC INSTITUTIONS:

Laws for support of as excepted from referendum, see STATUTES, 5, 6.

PUBLIC LANDS:

Unlawful enclosure of as defense in action of unlawful detainer, see FORCIBLE ENTRY AND DETAINER, 3.

PUBLIC SERVICE COMMISSION:

Regulation of public utilities, see EMINENT DOMAIN, 1.

Order requiring physical connection of telephone companies, see TELEGRAPHS AND TELEPHONES.

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN.

PUNISHMENT:

Failure to pay alimony, see DIVORCE.

QUESTION FOR JURY:

Holder of note in due course as question for jury, see BILLS AND NOTES, 16, 17.

Performance of building contract, see CONTRACTS, 3.

In action for injuries to minor from explosion of dynamite cap, see EXPLOSIVES, 1, 2.

Possession of plaintiff as question for jury, see FORCIBLE ENTRY AND DETAINER, 4.

Invitation to public to use highway, see HIGHWAYS, 3.

In action for injury to servant, see MASTER AND SERVANT, 1.

Negligence of city in maintaining wharf in dangerous condition, see MUNICIPAL CORPORATIONS, 24.

In action for injuries to person in city street, see MUNICIPAL CORPORATIONS, 20, 23, 26, 27.

In civil actions, see TRIAL, 4.

RAILROADS:

Appropriation of property, see EMINENT DOMAIN, 2.

Damage to property by change of street grade, see MUNICIPAL CORPORATIONS, 2.

In city streets, see STREET RAILROADS.

Liability for obstructing water course, see WATERS AND WATER COURSES.

1. RAILROADS—OPERATION—DAMAGES TO PROPERTY—LIABILITY—DAMNUM ABSQUE INJURIA. The jarring of buildings, the casting of smoke, sparks and soot on premises, and the emission of gases and fumes, necessarily incident to the ordinary operation of a railroad through

RAILROADS—CONTINUED.

a city, which results in depreciating the value of neighboring property is *damnum absque injuria*, in the absence of negligence on the part of the railway company. *Taylor v. Chicago, Milwaukee & St. Paul R. Co.*..... 592

RAPE:

1. **RAPE—RESISTANCE—SUFFICIENCY OF EVIDENCE.** In a prosecution for assault with intent to rape, a verdict against defendant is sustained by evidence showing that the prosecuting witness fought defendant as much as she was able; that she was afflicted with heart trouble, which prevented further resistance; and that, within an hour after the assault, she complained to two persons, one of them a policeman. *State v. Williams*..... 253
2. **RAPE—RELATION OF PERSON ASSAULTED—SUFFICIENCY OF EVIDENCE.** A finding by the jury that the prosecutrix in a prosecution for assault with intent to rape was not the wife of defendant was warranted, where the evidence showed that defendant had met her only a few times within a period of a few days preceding the assault, and that he did not know her name; and defendant testified he was a married man, and that his wife was in the courtroom during the trial, it being manifest that the person to whom he referred was not the prosecuting witness. *State v. Williams*..... 253

RATES:

Increase of assessment rate by fraternal benefit society, see **INSURANCE**, 4-13.

REASONABLE DOUBT:

Instructions, see **CRIMINAL LAW**, 5.

RECEIVERS:

Finality of order directing receiver to assess stockholders, see **APPEAL AND ERROR**, 1.

Of corporations in general, see **CORPORATIONS**, 6-9.

1. **RECEIVERS—ATTORNEY'S FEES—PERSONAL LIABILITY.** A receiver of an insolvent corporation is not personally liable to attorneys for any deficiency in the allowance by the court of their claim for compensation, where, under the orders of the court, he employed attorneys to serve him in his trust capacity, and in good faith endeavored to procure a proper allowance for them, in which effort the attorneys participated, and paid over to such attorneys the entire amount allowed by the court. *Willett & Oleson v. Jancke*..... 654

RECORDS:

See **CHATTEL MORTGAGES**.

On appeal, see **APPEAL AND ERROR**, 4-6, 13-21.

RECORDS—CONTINUED.

- False statements as to matters of record, see FRAUD, 1.
- Subsequent record of instruments, see LIS PENDENS.
- Of vote on passage of ordinance, see MUNICIPAL CORPORATIONS, 6.

REDUCTION:

- Of capital stock, see CORPORATIONS, 1, 2.

REFERENDUM:

- Construction of provision providing for referendum on new laws, see CONSTITUTIONAL LAW, 1.
- Laws subject to, see STATUTES.

REGISTRATION:

- Of chattel mortgages, see CHATTEL MORTGAGES.

REGULATION:

- Of public utilities by public service commission, powers of, see EMINENT DOMAIN, 1.
- Of motor vehicles, time for act to take effect, see STATUTES, 11.
- Of telephone companies by public service commission, see TELEGRAPHS AND TELEPHONES.

RELEASE:

- Of surety on supersedeas bond, see APPEAL AND ERROR, 10-12.

RELIANCE:

- Upon false statements of vendor, see FRAUD, 1.

RELOCATION:

- Of mining claims, see MINES AND MINERALS.

REMOVAL OF CAUSES:

- Change of venue or place of trial, see VENUE.

REPAIRS:

- Duty of county to keep highway in reasonable repair, see HIGHWAYS, 1, 2.

REPEAL:

- Of statute limiting assessment to estimated cost, effect, see MUNICIPAL CORPORATIONS, 14.

REPUDIATION:

- Of contract, see EXCHANGE OF PROPERTY, 2.

REQUESTS:

- For instructions, see TRIAL, 10, 11.

RESCISSION:

- Of contract for exchange of property, see **EXCHANGE OF PROPERTY**, 4, 5.
- Of contract by member of fraternal benefit society, see **INSURANCE**, 13.
- Of assignment of patent, see **PATENTS**.
- Of contract of sale, see **SALES**, 2, 3.
- Of contract for sale of land, see **VENDOR AND PURCHASER**, 1-3.

RESIDENCE:

- Of incompetent person, see **INSANE PERSONS**, 1, 2.

RES IPSA LOQUITUR:

- Injuries from blasting, see **EXPLOSIVES**, 5.
- Instructions as to burden of proof to rebut presumption of negligence, see **TRIAL**, 8.

RESISTANCE:

- To attempt to commit rape, see **RAPE**, 1.

RESTAURANTS:

- Publication charging conducting of in uncleanly manner as libel, see **LIBEL AND SLANDER**, 2-11.

REVENUE:

- See **TAXATION**.

REVIEW:

- See **APPEAL AND ERROR**.
- In criminal prosecution, see **CRIMINAL LAW**, 4, 5.

ROADS:

- See **HIGHWAYS**.
- Streets in cities, see **MUNICIPAL CORPORATIONS**, 1, 2, 5, 7, 9, 10, 20, 21, 23, 26, 27, 29-31.

SAFE PLACE TO WORK:

- See **MASTER AND SERVANT**, 1, 3.

SALARY:

- Increase of salary of manager as ground for receiver, see **CORPORATIONS**, 8.

SALES:

- Assigned account, see **ASSIGNMENTS**.
- Priority of mechanics' lien over interest of vendor in conditional sale contract, see **CONSTITUTIONAL LAW**, 5, 6.
- Of corporate stock, see **CORPORATIONS**, 1, 2.
- Requirements of statute of frauds, see **FRAUDS, STATUTE OF**, 2-4.
- Of stock of goods in bulk, see **FRAUDULENT CONVEYANCES**, 2.

SALES—CONTINUED.

Rights of assignee on payment of sums due on conditional sales contract, see SUBROGATION.

Of realty, see VENDOR AND PURCHASER.

1. SALES—FRAUD—FALSITY—INCUMBRANCE. A representation by a vendor of hotel furniture that there was no incumbrance on it would be fraudulent as to the purchaser, when in fact there was an existing chattel mortgage thereon, even if, under the advice of his attorney, the vendor did not deem the mortgage a valid lien. *Gillette v. Anderson*..... 81
2. SALES—RESCISSION—FRAUD. Misrepresentations as to the value and present condition of a going business, inducing a purchase by one who is unfamiliar with the facts warrants a rescission. *Randolph v. Togus*..... 322
3. SALES—CONTRACTS—ACTION TO RESCIND—SUFFICIENCY OF EVIDENCE—FRAUD. The evidence is sufficient to show fraud in the sale of a half interest in an employment office, as brought about by fraudulent and misleading representations, where it appears that the defendants advertised the half interest of one partner in an employment office for sale; that plaintiffs sought them out for the purpose of purchase; that defendants represented the business was in good repute and profitable, earning from \$15 to \$30 per day, and in the busy season \$50 per day; that plaintiffs bought a half interest and took charge, but soon discovered that the representations were false; that the business was earning nothing; and that, upon discovery that the business was in bad repute and that there were no earnings or profits, they demanded a rescission. *Gray v. Fuller*..... 13
4. SALES—PARTIES. Where a lumber company ordered a bill of lumber from another company to supply the former's customer, and the lumber was delivered direct to the customer on the customer's assurance that he would "stand good for it," but the bill was made out to the purchasing company, and the customer was, by the seller, merely requested "to protect" it, the transaction shows that the seller regarded the first company as the purchaser and primarily liable for the debt. *First National Bank v. Geske & Co.*..... 477
5. SALES—LIABILITY OF BUYER—WHEAT IN WAREHOUSE. Where a warehouseman accepted wheat, making advances and giving a warehouse receipt therefor, under an agreement that sale was to be made on a future day when the grower should be satisfied with the market, and a grain company repaid the advances made on the wheat by the warehouseman, on his draft therefor accompanied by the indorsed warehouse receipt, and shipments from this wheat were made on the orders of the grain company, the grain company cannot claim that the money advanced was a loan and not an advancement on the future sale as per agreement, and hence would be liable to the seller for the market price on the day set by him for the sale, regardless

SALES—CONTINUED.

of the fact that there was not enough wheat in the warehouse at that time to cover the amount called for by the warehouse receipt. *Bollen v. Northern Grain & Warehouse Co.*..... 86

6. **SALES—SUFFICIENCY OF EVIDENCE—PROMISE TO PAY.** An original promise of defendant to pay for goods sold and delivered to another, his tenant, is sufficiently established where the evidence shows that the tenant was farming certain lands of defendant on an agreement to share the crops; that the tenant was indebted to a storekeeper for groceries and farm implements, and had been refused further credit; that the defendant paid what was due on the groceries, but refused to pay the indebtedness for the machinery, and testified that he said, "I have paid the account as I agreed, now it is up to you, what will you do," and the storekeeper said the tenant could have such further credit as he desired; while on the other hand, the testimony of the storekeeper was that defendant told him to let the tenant have "what he wanted and he would pay him dollar for dollar," and this testimony was corroborated by that of the tenant and by an employee of the storekeeper, and by the further fact that the tenant was already indebted to the amount of his own share in the crop, and it was to defendant's interest to see that he was supplied with goods necessary to carry on harvest operations, so that the defendant would be able to realize his half share in the crops. *Lovell v. Hays*..... 109
7. **SALES—CONDITIONAL SALES — NATURE OF SELLER'S INTEREST — ASSIGNMENT OF CONTRACT—RIGHTS OF ASSIGNEE.** The seller of goods under a conditional sales contract retains the absolute title thereto, subject to be defeated by the payment of whatever balance is due upon the agreed purchase price; hence an assignment of the contract to a third party which had been advancing to the vendee the sums due on the contract, purporting to transfer all the interest that the vendor "has ever had in the property," would operate to pass no more than the vendor's defeasible interest for the balance due, which would be extinguished on payment of such balance to the assignee. *Duarte v. Minnick*..... 539

SALVAGE:

As reducing loss by fire, see **INSURANCE**, 2.

SCHOOLS AND SCHOOL DISTRICTS:

1. **SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—RIGHT TO COMPENSATION.** Where one employed as superintendent of schools was not entitled to the office because there was no vacancy, but at the same time entered into a regular teacher's contract with the majority of the board to teach in the schools of the district, he is entitled to the contract price for services actually performed by him under the contract as a teacher. *Caldwell v. School District No. 301*..... 70

SEPARATE MAINTENANCE:

Action for, see HUSBAND AND WIFE, 2.

SERVICE:

Term of jury service, see JURY, 1.

SHIPPING:

Breach of contract for carriage of goods, see CARRIERS.

Injury from collision of boats, see COLLISION.

Taxation of vessels, see TAXATION, 1, 2.

1. **SHIPPING—CONTRACTS—TOWAGE OR CHARTER PARTY—INJURY TO VESSEL—LIABILITY.** A contract of bailment for hire constituting a charter party, and not one of towage, is established by evidence showing that defendant was using its own tugs and barges to convey sand from plaintiff's sand plant to contractors at V. who, becoming urgent for sand, contracted with plaintiff for the use of his scow for a certain voyage, to be loaded by plaintiff and then towed by defendant, and that plaintiff had nothing to do with the towing of the scow, but that the use of his scow for the particular trip mentioned was hired from him by the defendant; hence loss or damage to the scow is to be measured according to the law of bailment. *Parker v. Washington Tug & Barge Co.*..... 575
2. **SAME—NEGLIGENCE—CHARTERER—BURDEN OF PROOF.** Where a chartered scow broke away from her tow and was wrecked and was injured while in the exclusive possession of the bailee, the burden is upon it to show how the injury occurred and that it was free from negligence. *Parker v. Washington Tug & Barge Co.*..... 575
3. **SHIPPING—INJURY TO SCOW—INSTRUCTIONS—REASONABLE CARE.** In instructing the jury on the measure of defendant's duty while in possession of a scow as bailee, the use of the term "responsible" in place of "reasonable," as modifying "skill and care" was not prejudicial as tending to mislead the jury, where subsequently in the same instruction it was said that the exercise of "reasonable care and caution and maritime skill" was all that was required. *Parker v. Washington Tug & Barge Co.*..... 575
4. **SHIPPING—INJURY TO SCOW—INSTRUCTIONS—LIABILITY.** In an action for damages to a scow while bailed to defendant, where the evidence was conflicting as to whether plaintiff had authorized the defendant to employ another tugboat company to tow the scow with a gasoline tug of insufficient power, it was proper to instruct the jury that, if plaintiff knew nothing of the arrangement for the use of a gasoline tug and did not consent thereto, the defendant would be liable if the scow was damaged as claimed. *Parker v. Washington Tug & Barge Co.*..... 575

SIGNATURES:

To petition for commercial waterway district, see NAVIGABLE WATERS.

SITUS:

Of vessel for purpose of taxation, see **TAXATION**, 2.

SLANDER:

See **LIBEL AND SLANDER**.

SPEED LIMIT:

Instructions as to speed limit of street car, see **STREET RAILROADS**.

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 5, 13, 14.

Opening statement of counsel, see **PLEADING**, 1.

STATES:

Appropriation measures for support of state government and institutions, see **STATUTES**, 2-6.

STATUTES:

See **MECHANICS' LIENS**; **FORCIBLE ENTRY AND DETAINER**.

Holder in due course, of bank check, see **BILLS AND NOTES**, 3, 4.

Statute of frauds, see **FRAUDS**, **STATUTE OF**.

Bulk stock laws, see **FRAUDULENT CONVEYANCES**, 2.

Lien of judgment, see **JUDGMENT**.

Of limitation, see **LIMITATION OF ACTIONS**.

Public improvements, see **MUNICIPAL CORPORATIONS**, 3, 4, 14, 15.

Relating to assessments for public improvements, see **MUNICIPAL CORPORATIONS**, 11, 14, 15.

Assessment of bank stock, see **TAXATION**, 3.

1. **STATUTES—ENACTMENT—PRESUMPTIONS AS TO VALIDITY.** Necessity for the enactment of a law prohibiting the diversion or transfer of special funds as a temporary loan is apparent, when it is an open question whether such transfer could be enjoined under a prior law. *State ex rel. Case v. Howell*..... 281
2. **STATUTES—ENACTMENT—REFERENDUM —“SUPPORT.”** The seventh amendment of the state constitution (Const., art. 2, § 1, subd. b) giving the right of referendum upon all laws except such as may be necessary for the “immediate preservation of the public peace, health and safety, [and the] support of the state government and its existing public institutions,” contemplates “support” as including appropriations for current expenses, maintenance, upkeep, continuation of existing functions, as well as appropriations for such new buildings and conveniences as may be necessary to meet the needs and requirements of the state in relation to its existing institutions. *State ex rel. Blakeslee v. Clausen*..... 260
3. **SAME — REFERENDUM — APPROPRIATIONS.** Under such referendum clause of the constitution, a law providing for a state institution and

STATUTES—CONTINUED.

- carrying an appropriation is subject to referendum, where it brings the state into a new activity or provides for a new function, so that it might be fairly said that it did not pertain to the support of the government as then organized, or to any existing institution. *State ex rel. Blakeslee v. Clausen*..... 260
4. SAME—REFERENCE OF PART OF ACT—EFFECT ON “SUPPORT” PROVISIONS. All ordinary appropriation bills are excepted from the operation of such referendum clause of the constitution; but the presence of an appropriation measure as part of a bill would not necessarily deprive the people of the right to pass upon other portions of the bill; nor would an appropriation for the support of an existing institution fall while some particular item in a general law of which it is a part is subject to referendum. *State ex rel. Blakeslee v. Clausen* 260
5. SAME — “PUBLIC INSTITUTIONS.” The highway department, the fisheries department, and the state fair are “public institutions” of the state, within the meaning of the referendum amendment to the constitution excepting laws for their support from the operation of the amendment; since “public institutions” includes all departments exercising any state activity or function. *State ex rel. Blakeslee v. Clausen* 260
6. STATUTES — ENACTMENT — REFERENDUM — “IMMEDIATE.” In the clause of the referendum section of the constitution excepting from its operation laws for “the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions,” the qualifying adjective “immediate” refers solely to the subsequents of the series, and not to the term “support”; hence appropriation measures for the support of state government and institutions are reserved from referendum, although not of an emergent character. *State ex rel. Blakeslee v. Clausen*. 260
7. STATUTES—ENACTMENT—REFERENDUM—EXCEPTIONS. The purpose of the exception to the power of referendum as guaranteed by the state constitution is to preserve unimpaired the right of the legislature to exercise the police power, without the delay attendant on a referendum of the law to the people, only in such cases where the necessity of its exercise may be emergent, and this question of emergency, in cases of doubt, should be treated as a legislative one, and the doubt resolved in favor of the declaration of emergency made by the legislative body. *State ex rel. Case v. Howell*..... 281
8. STATUTES—ENACTMENT—REFERENDUM—EXCEPTIONS. Only laws invoking those certain, definite, and unquestioned phases of the police power which, in their very nature, usually are emergent, as those necessary for the immediate preservation of the public peace, health, or safety, and such measures as are essential to the preservation of

STATUTES—CONTINUED.

these things, namely laws necessary for the support of the state government and its existing public institutions, have been excepted by the seventh amendment of the state constitution from the operation of the referendum. *State ex rel. Case v. Howell*..... 281

9. STATUTES — ENACTMENT — REFERENDUM — EXCEPTIONS. An act to protect from depletion by transfer or diversion funds collected by cities of the first class from sale of bonds or otherwise for any local improvement by special assessment, and the proceeds of bonds or other obligations authorized by a vote of the people for any special improvement or purpose, in its scope being intended to cover depletion of funds devoted to highway, sewage, and disposal of garbage purposes, as well as other purposes, directly relates to the preservation of the public health or safety, and may be reasonably deemed as so emergent in its character, as to warrant the legislature in enacting its immediate taking effect. *State ex rel. Case v. Howell*. 281
10. STATUTES—ENACTMENT—TIME OF TAKING EFFECT. The legislature, in the absence of constitutional restraint, can fix any time in the future as the time when laws shall become effective. *State ex rel. Blakeslee v. Clausen*..... 260
11. STATUTES — REFERENDUM — TIME OF TAKING EFFECT — EMERGENCY. The legislative enactment (Laws 1915, p. 227) for the regulation of motor propelled vehicles along streets and highways as common carriers of passengers by requiring the persons so operating them to take out permits and execute surety bonds to pay all damages sustained by persons injured in the conduct of the business of transporting passengers, and by providing for civil actions to recover against the carrier and his bondsman for the negligence of the carrier, is an attempt at regulation, even if not wholly adequate; and if a state of facts can reasonably be presumed to exist which would justify the legislation, courts must presume that the law was passed for that reason as an exercise of police power; and, its necessity being doubtful, the question of emergency will be treated as a legislative question, and the doubt resolved in favor of the declaration of emergency made by the legislative body. *State ex rel. Case v. Howell* 294
12. SAME. The declaration of immediate emergency existing at the date of the enactment of a law, followed by the declaration that it shall take effect thirty days thereafter, is not such a contradiction in terms as to make invalid the emergency provisions; since laws take effect immediately, although their operation may be deferred for a time, and the intent of the law was merely to give those affected a reasonable period of time in which to adjust themselves to the changed condition effected by the law. *State ex rel. Case v. Howell* 294

STATUTES—CONTINUED.

13. **SAME.** The word "immediate," as used in art. 2, § 1, subd. b, of the state constitution excepting from the right of referendum emergency legislation in matters of the "preservation of public peace, health or safety," does not import the exclusion of any interval of time, but there is a certain latitude to be given the significance of the word, and it may mean "close to" the time of enacting the law, and that it is within the power of the legislature to cause it to take effect at a future date with reference to the operation of the act. *State ex rel. Case v. Howell*..... 294

STAY:

Pending appeal, see **APPEAL AND ERROR**, 10-12.

STIPULATIONS:

As to filing statement of facts, see **APPEAL AND ERROR**, 14.

STOCK:

Corporate stock, see **CORPORATIONS**, 1, 2.

Assessment of bank stock, see **TAXATION**, 3.

STOCKHOLDERS:

Finality of order in receivership proceedings, directing assessment upon stockholders, see **APPEAL AND ERROR**, 1.

Of corporations, see **CORPORATIONS**, 1, 7-9.

STREET RAILROADS:

1. **STREET RAILROADS — INJURIES — COLLISIONS — NEGLIGENCE — SPEED LIMIT—ISSUES AND INSTRUCTIONS.** In an action for personal injuries sustained in a collision between an automobile and a street car, alleged by plaintiff to have been exceeding the city speed limit, in which there was a conflict in the evidence on that point, but no evidence of any unusual conditions, and the facts tended to show that the motorman had a clear right of way and was authorized to run within the speed limit fixed, it is error to instruct that the railway company was guilty of negligence, although not exceeding the limit, if the street car was running at a greater speed than an ordinarily careful person would have operated it under the circumstances and conditions. *Gifford v. Washington Water Power Co.*..... 341

STREETS:

See **HIGHWAYS**; **MUNICIPAL CORPORATIONS**, 1, 2, 5, 7, 9, 10, 20, 21, 23, 26, 27, 29-31.

Change of grade as obstructing water course, see **WATERS AND WATER COURSES**.

STRIKES:

Enjoining interference with employees by labor union, see **INJUNCTION**.

SUBROGATION:

1. **SUBROGATION—EXTENT OF DOCTRINE.** The right of subrogation is not limited to sureties and quasi sureties, but is freely applied by courts of equity in all cases where good conscience and equity dictate that a debt paid by one under any sort of legal coercion ought to be paid by another. *University State Bank v. Steeves*..... 55
2. **SUBROGATION—RIGHT OF MORTGAGOR—PAYING DEBT AFTER SALE OF PROPERTY.** Where a mortgagor of personalty, having transferred the property subject to the mortgage, was subsequently compelled to pay the mortgage indebtedness, and took an assignment of the note and mortgage, the debt was not thereby discharged, but he was entitled to be subrogated to all the rights of the mortgagee and he or his assignees could enforce foreclosure. *University State Bank v. Steeves* 55
3. **SUBROGATION — ASSIGNMENT OF CONDITIONAL SALES CONTRACT — RIGHTS OF ASSIGNEE.** The mere fact that a bank advanced sums of money from time to time as loans to aid a company in making payments on machinery under a conditional sales contract, under an indefinite and uncertain agreement that the bank should have security thereon, which was never consummated in any way, and that the bank finally paid off the balance due on the machinery, receiving an assignment of the conditional sale contract, would not entitle it to be subrogated to the rights of the conditional sales vendor or give it greater rights than those of an unsecured creditor. *Duarte v. Minnick* 539

SUBSCRIPTIONS:

Assessment of stockholders for unpaid subscriptions to stock of foreign corporation, see **CORPORATIONS**, 9.

SUIT MONEY:

Pending action by wife for separate maintenance, see **HUSBAND AND WIFE**, 2.

SUPERSEDEAS:

On appeal, see **APPEAL AND ERROR**, 10-12.

SUPPORT:

Appropriation measures for support of state government and institutions, see **STATUTES**, 2-6.

SURFACE WATERS:

See **WATERS AND WATER COURSES**, 5.

SURPLUS:

Of fraternal benefit society, see **INSURANCE**, 12.

SURPLUSAGE:

In pleading, see PLEADING, 1.

TAXATION:

Assessment for public improvement, see MUNICIPAL CORPORATIONS, 7-19.

1. **TAXATION—PROPERTY SUBJECT—SHIPPING—EXEMPTIONS—CONSTITUTIONAL LAW.** Under Const., art. 7, § 2, providing that the legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, Rem. & Bal. Code, § 9093, is unconstitutional in so far as it exempts from taxation ships or vessels whose situs is within this state, when they are used exclusively in trade between this state and other states and territories of the United States, or foreign countries. *Pacific Cold Storage Co. v. Pierce County* 626
2. **TAXATION—SHIPPING—SITUS OF VESSEL.** The permanent situs of a vessel engaged in foreign or domestic trade, for the purposes of taxation, is fixed by the domicile of the owner, where the port of registry and home port are in the same place and the vessel has not acquired a situs elsewhere. *Pacific Cold Storage Co. v. Pierce County* 626
3. **TAXATION—ASSESSMENT—BANK STOCK—DEDUCTIONS—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 9134, providing that bank stock shall be assessed at its full and fair value in money, first deducting therefrom the proportionate part of the assessed value of real estate belonging to the bank, where the assessed value of the capital stock was determined by considering the value of its real estate over and above the amount of a mortgage thereon, the amount to be deducted therefrom is such value of the real estate entering therein, and not the value of the real estate regardless of the mortgage; in view of Const., art. 7, § 1, providing that "all property" not exempt shall be assessed in proportion to its value and Id., § 2, providing for a uniform and equal rate of taxation upon all property; since, otherwise, instead of avoiding double taxation, part of the bank's property would escape taxation. *Scandinavian American Bank of Tacoma v. Pierce County*..... 348

TEACHERS:

Right to compensation, see SCHOOLS AND SCHOOL DISTRICTS.

TELEGRAPHS AND TELEPHONES:

1. **TELEGRAPHS AND TELEPHONES—REGULATION—PUBLIC SERVICE COMMISSION.** In a mandamus proceeding by the public service commission to compel certain telephone companies to comply with an order requiring them to make physical connection so as to transmit one another's messages, the commission cannot urge that one of the companies, which had been dismissed as a party to the proceedings before it, has no right to be heard in the mandamus proceeding be-

TELEGRAPHS AND TELEPHONES—CONTINUED.

cause of its failure to cause the proceedings before the public service commission to be reviewed, as required by 3 Rem. & Bal. Code, §§8626-86 and 8626-99, which declares conclusive the orders of such commission unless set aside or annulled in proceedings to review the orders; since it had been dismissed and its rights were not affected, and since in such proceedings the commission was acting judicially, and its orders, if not erroneous merely but made without authority and void, would be subject to collateral attack. *State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co.* 29

2. TELEGRAPHS AND TELEPHONES—PUBLIC SERVICE COMMISSION—REGULARITY OF ACTION—PRESUMPTIONS. Where it is sought by mandamus to compel compliance with the orders of the public service commission requiring physical connection of two telephone systems and the transmission of messages of one over the lines of the other, the presumption of regularity and validity attaches to the order, and the burden is upon the defendants to show the unreasonableness and lack of necessity of the commission's order; and hence it was proper to permit defendants to introduce evidence tending to show that the order was contrary to law, and that the effect of the order would be to deprive the defendants of their property in violation of the fourteenth amendment of the Federal constitution. *State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co.* 29
3. TELEGRAPHS AND TELEPHONES — REGULATION — CONNECTING LINES. Where one telephone company has by contract opened its lines to physical connection and services for another telephone company upon certain terms, its act is equivalent to a declaration of a purpose to waive its primary right of independence, and it can be required, as a state regulation within the police power, to accord the same facilities, conveniences and uses to other telephone companies upon equal terms. *State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co.*..... 29
4. TELEGRAPHS AND TELEPHONES — REGULATION BY PUBLIC SERVICE COMMISSION — ORDERING CONNECTION — APPROPRIATION OF PROPERTY WITHOUT COMPENSATION. An order of the public service commission for the physical connection of two telephone companies and the transmission of messages of each over the lines of the other, without any provision being made for compensation, either as tolls for temporary service, or for the cost of the physical connection, or for the permanent use of the lines and facilities of either of the said companies is void as an attempted taking of private property without due compensation, in violation of art. 1, § 16, of the state constitution and of the fourteenth amendment of the constitution of the United States. *State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co.*..... 29

TELEGRAPHS AND TELEPHONES—CONTINUED.

5. **SAME.** While the public service commission has power to order such a physical connection, it must be without discrimination, with provisions for the payment of the cost, and reasonable regulations. *State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co.*..... 29

TENDER:

Of performance on breach of contract, see **EXCHANGE OF PROPERTY**, 2.

TERM:

Of service, see **JURY**, 1.

THEFT:

Of note before delivery, see **BILLS AND NOTES**, 8.

TIME:

For filing brief and abstract, see **APPEAL AND ERROR**, 19.
 For rescission of contract, see **EXCHANGE OF PROPERTY**, 5.
 For laws to take effect, see **STATUTES**, 10-13.
 Motion for judgment *non obstante*, see **TRIAL**, 3.

TITLE:

See **FORCIBLE ENTRY AND DETAINER**.
 Retention of apparent title by grantor, see **FRAUDULENT CONVEYANCES**, 1.
 Of vendor in conditional sales contract, see **SALES**, 7.

TORTS:

See **COLLISION**; **FORCIBLE ENTRY AND DETAINER**; **FRAUD**; **LIBEL AND SLANDER**; **MALICIOUS PROSECUTION**; **NEGLIGENCE**.
 Measure of damages, see **DAMAGES**.
 Causing death, see **DEATH**.
 Negligence in care or use of explosives, see **EXPLOSIVES**.
 Of employers, see **MASTER AND SERVANT**.
 Damage to property from operation of railroad, see **RAILROADS**.
 Negligence of bailee of scow, see **SHIPPING**.

TOWAGE:

See **SHIPPING**.

TRADE-MARKS AND TRADE-NAMES:

1. **TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—IMITATION.** Fraud amounting to unfair competition by the confusion of things used in the label of another which through such other's prior use had come to connote a particular thing, depends upon whether the same would be reasonably calculated to deceive the common or usual purchaser of the given article when exercising ordinary care. *Pacific Coast Condensed Milk Co. v. Frye & Co.*..... 133

TRADE-MARKS AND TRADE-NAMES—CONTINUED.

2. **TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—IMITATION—LABELS AND COLORS.** Unfair competition in the use of a similar label for a like article of goods, sufficient to warrant injunction, is not shown by the fact that plaintiff for a number of years had on the market a condensed milk known as "Carnation Brand Sterilized Evaporated Milk," and that the defendant later put out an article known as "Wild Rose Brand Sterilized Milk," when the specific points of resemblance in the labels are that both are made of the same colors of red and white in bands of uniform width with their relative positions reversed; that the central group of one consists of a bunch of three carnations and the other of three wild roses, and that there is a resemblance in number, size, arrangement and relative position of the several parts and words and in the colors in which the same are represented, excepting that the title "Carnation" is in script type and that of "Wild Rose" in Roman; since there is no *idem sonans* in the names, and similarity in the color scheme alone is not sufficient to constitute an infringement; especially where there was no evidence that dealers or consumers had been deceived by the similarity in color and design. *Pacific Coast Condensed Milk Co. v. Frye & Co.*..... 133
3. **TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—IMITATION—DECEPTION OF PUBLIC.** Although a label for a competing article of goods may manifest a similarity in color scheme and grouping which might be characterized as ethically questionable, yet where the differences are so prominent as to negative a design to deceive an intending purchaser of ordinary intelligence using reasonable caution, and there is no evidence of a single person having been deceived, the burden being on plaintiff to establish that fact, the use of such label will not be enjoined. *Pacific Coast Condensed Milk Co. v. Frye & Co.*..... 133

TRANSCRIPTS:

Of record for purpose of review, see **APPEAL AND ERROR**, 4-6, 13-21.

TRESPASSERS:

In use of city wharf, see **MUNICIPAL CORPORATIONS**, 25.

TRIAL:

See **NEW TRIAL**.

Exceptions or objections for purpose of review, see **APPEAL AND ERROR**, 3-7.

Review of errors as dependent on presentation of same by record, see **APPEAL AND ERROR**, 4-6, 13-17, 43.

Review of verdicts, see **APPEAL AND ERROR**, 31-33.

Review of errors as dependent on prejudicial nature of same, see **APPEAL AND ERROR**, 43-54.

Instructions as to degrees of offense, see **ASSAULT AND BATTERY**, 1.

TRIAL—CONTINUED.

- Continuance of, see CONTINUANCE.
 - Of criminal prosecution, see CRIMINAL LAW.
 - Discontinuance of for failure to pay alimony, see DIVORCE.
 - Instructions in action for injury from blast, see EXPLOSIVES, 4.
 - Expiration of jury term during trial, effect, see JURY, 1.
 - Instructions in action for publication of libel, see LIBEL AND SLANDER, 11.
 - Mandamus to compel court to proceed with trial, see MANDAMUS.
 - Instructions in action for injury to servant, see MASTER AND SERVANT, 2.
 - Instructions in action for injuries to person struck by motor truck, see MUNICIPAL CORPORATIONS, 31.
 - Opening statement of counsel, overstatement of case, see PLEADING, 1.
 - Instructions in action for damages to scow in possession of bailee, see SHIPPING, 3, 4.
 - Instructions as to negligence in exceeding speed limit, see STREET RAILROADS.
 - Place of trial, see VENUE.
 - Instructions in action for flooding lands by obstructing water course, see WATERS AND WATER COURSES, 4-7.
 - Impeachment of witness, see WITNESSES, 3.
1. TRIAL—MISCONDUCT OF COUNSEL—IMPROPER ARGUMENT. Where the argument of counsel transgresses the bounds of propriety by seeking to inflame the minds of the jury against a defendant corporation, and urging that, in order to hold the corporation, they must find against a certain other defendant, it is prejudicial to the latter defendant; and the refusal of the court to interfere when requested, or to instruct the jury to disregard the remarks of counsel, possibly leading the jury to believe the court indorsed the statements, tended to enhance the prejudice. *Johnston v. Seattle Taxicab & Transfer Co.* 551
 2. TRIAL—DIRECTION OF VERDICT — CORRECTION OF ERROR — JUDGMENT NOTWITHSTANDING VERDICT. The action of the court in rendering judgment *non obstante veredicto*, after overruling a motion for nonsuit and a challenge to the sufficiency of the evidence, was proper, where there was no sufficient evidence on which to base a recovery introduced at the trial; since, if the court decided erroneously in the first instance, its powers were ample to correct its error at any time before the entry of a final judgment. *Beck v. International Harvester Co. of America*..... 413
 3. SAME—TIME FOR MOTION. Where judgment on a verdict has not been actually entered, the court would not be precluded from rendering judgment *non obstante* from the mere fact that a right existed to entry of judgment on the return of the verdict. *Beck v. International Harvester Co. of America*..... 413

TRIAL—CONTINUED.

4. SAME—TAKING CASE FROM JURY. Where there is a substantial conflict in the evidence, the court has no right to determine, as a question of law, a motion for nonsuit, a challenge to the sufficiency of the evidence, or a motion for a judgment notwithstanding the verdict, on the ground that the party holding the affirmative has failed to prove a cause for the jury. *Beck v. International Harvester Co. of America*..... 413
5. TRIAL—VERDICT—MISTAKE—CORRECTION—NEW TRIAL. Where the jury returned a verdict for the defendant by mistake, and was discharged and allowed to separate, the court is without power to call the jury together to correct its mistake and render a verdict for the plaintiff; the remedy being to grant a new trial. *Quarring v. Stratton* 333
6. TRIAL—JUDGMENT—CONSTRUCTION AS FINDING. Where the judgment in an action to rescind a sale for fraud recites that the court finds that the sale was induced by the fraudulent representations of the defendants, the same is a finding upon an ultimate fact in the case and the only one in issue, and it cannot be urged that the judgment has no findings of fact to support it. *Gray v. Fuller* 13
7. TRIAL—INSTRUCTIONS—FAILURE TO COVER EVIDENCE—REMEDY. The remedy for instructions not sufficiently full to cover the entire evidence on a particular subject is to ask for further instructions, not to object to the instructions given. *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.*..... 395
8. TRIAL—INSTRUCTIONS—RES IPSA LOQUITUR—BURDEN OF PROOF. In an action for negligence involving the question of *res ipsa loquitur*, the proper instruction would be that the burden is upon plaintiff to establish all his controverted allegations by a fair preponderance of the evidence; and where a situation necessarily raised an inference of defendant's negligence, the burden then devolves upon defendant to rebut such presumption by evidence of due care and proper precaution. *Briglio v. Holt & Jeffery*..... 155
9. TRIAL—ISSUES AND PROOF—INSTRUCTIONS. Although the pleadings might be obscure, the court could properly base instructions on evidence admitted without objection, which was broader than the pleadings. *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.*... 395
10. TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS. The refusal of requested instructions based on defendant's theory of the case was proper, when not in conformity with the correct theory adopted by the trial court. *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.* 395
11. TRIAL—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN. The refusal of requested instructions is not error, where they are fully covered by the instructions given. *Beach v. Seattle*..... 379

TRIAL—CONTINUED.

12. **TRIAL—ACTIONS—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.** An instruction is not prejudicial as a summing up instruction which fails to contain all the elements necessary to warrant a verdict for the plaintiff, when it does not purport to state the whole law of the case, and is preceded and followed by other instructions, which state the necessary elements. *Holmes v. Strong*..... 7
13. **TRIAL—INSTRUCTIONS—CONSTRUCTION AS WHOLE.** Though isolated parts of instructions, standing alone, might be objectionable, it would not constitute error, where, taken in connection with the balance of the instructions in context, they properly state the law. *Beach v. Seattle* 379

TRUSTS:

Trust deed of corporate properties, see **CORPORATIONS**, 4, 5.

UNLAWFUL DETAINER:

See **FORCIBLE ENTRY AND DETAINER**.

VACATION:

Of appointment of guardian, see **INSANE PERSONS**, 5.

Action by judgment creditor to set aside fraudulent conveyance, limitations, see **JUDGMENT**.

VARIANCE:

In action on bank check, see **BILLS AND NOTES**, 14.

Between pleading and proof in civil action, see **PLEADING**, 2.

VENDOR AND PURCHASER:

Fraud of vendor inducing sale of land, see **FRAUD**.

Purchasers of property fraudulently conveyed, see **FRAUDULENT CONVEYANCES**, 3-8.

Fraud in procuring option on interest of partner, see **PARTNERSHIP**, 2.

Transfer of ownership of personal property, see **SALES**.

1. **VENDOR AND PURCHASER—RESCISSION BY VENDOR—WAIVER—NECESSITY OF DEMAND.** Where the purchasers under a real estate contract for the sale of land on time payments are waging an action of rescission and thus repudiating the contract, they are not in a position to insist that no forfeiture could be declared by the vendor for non-payment of installments due without demand made and the lapse of a reasonable time for compliance therewith. *Myers v. Calhoun, Denny & Ewing*..... 689
2. **VENDOR AND PURCHASER—RESCISSION — FALSE REPRESENTATIONS—RELIANCE ON.** Rescission will be granted to a purchaser of lands, located at a distance, who was misled by the vendor's representations,

VENDOR AND PURCHASER—CONTINUED.

the falsity of which were not readily ascertainable, although he did not avail himself of the vendor's offer to pay the expenses of a trip to inspect the land; since ordinary prudence does not require a person to test the truthfulness of representations made on personal knowledge with the intent that they shall be believed and acted on. *Christensen v. Koch*..... 472

3. VENDOR AND PURCHASER—RESCISSION BY PURCHASER — MISREPRESENTATIONS—SUFFICIENCY OF EVIDENCE. Rescission of a contract for the sale of land will not be granted for fraud in representing that the land was adapted to the raising of high grade winter apples, where the testimony as to the adaptability of the land for orchard purposes was conflicting and there was testimony to the effect that alfalfa was prospering on the land, that the plaintiffs spent only a few months on the land preparing it for irrigation and planting, and after finding that the expense was greater than they anticipated, sought to get a reduction in the price; that plaintiffs, while not practical farmers, possessed the powers of observation and judgment and had opportunities to observe the soil and condition of neighboring orchards planted upon land of the same character; and did not attempt to rescind until more than two years after the purchase, at a time when they were in default upon payments due, lien claims had been filed against the land for work thereon, the lands in that locality had depreciated in value, and attempts to resell the property had failed. *Myers v. Calhoun, Denny & Ewing*..... 689
4. VENDOR AND PURCHASER—BONA FIDE PURCHASER—POSSESSION—NOTICE. The retention of possession by grantors, after giving a deed conveying full title, is not constructive notice to an innocent subsequent purchaser from the grantee that the grantor retained an interest in the land; since the absolute conveyance estops the grantor from setting up any secret arrangement which might impair the grant. *Crawford v. Timm*..... 568

VENUE:

1. VENUE—CHANGE—PREJUDICE OF JUDGE—MOTION — JURISDICTION OF COURT. Under 3 Rem. & Bal. Code, § 209-2, authorizing change of judge for prejudice, the filing of a motion for change of judge, accompanied by an affidavit of prejudice, divests the lower court of jurisdiction to further proceed in the action, although made in connection with defendant's first appearance in the action. *State ex rel. Hannebohl v. Superior Court*..... 663

VERDICT:

- Review on appeal, see APPEAL AND ERROR, 31-33.
 Inadequate or excessive damages, see DAMAGES, 2, 3.
 Excessive verdict for loss on fire insurance policy, see INSURANCE, 2.
 In civil actions, see TRIAL, 2-5.

VESTED RIGHTS:

- Equal protection of laws, see CONSTITUTIONAL LAW, 4.
- Of certificate holder in fraternal benefit society, see INSURANCE, 3, 6.

VICE PRINCIPALS:

- See MASTER AND SERVANT, 4.

VOTE:

- Of council on passage of ordinance, record of, see MUNICIPAL CORPORATIONS, 6.
- Laws subject to referendum vote, see STATUTES.

WAIVER:

- Error waived in appellate court, see APPEAL AND ERROR, 24, 44.
- Of objections to deposition, see DEPOSITIONS.
- Of right to rescind contract, by delay, see EXCHANGE OF PROPERTY.
- Of statute as defense, see FRAUDS, STATUTE OF, 4.
- Of objections to assessment for improvement, see MUNICIPAL CORPORATIONS, 11.
- Of objections to action by partnership, see PARTNERSHIP, 3.
- Of necessity for demand for payments due, before forfeiture by vendor, see VENDOR AND PURCHASER, 1.

WAREHOUSEMEN:

- Sale of wheat in warehouse, see SALES, 5.

WATERS AND WATER COURSES:

- See NAVIGABLE WATERS.

1. **WATERS AND WATER COURSES — OBSTRUCTION — CHANGE OF STREET GRADE—LIABILITY OF RAILROAD.** A railroad company cannot escape liability for obstructing a water course by changing the grade of a street in the construction of an approach to the railway crossing of the street on the theory that it was a duty devolving upon the municipality, which service the railway company was employed to perform as a contractor and agent of the town, when it appears that the change in grade, as a part of the embankment and approach, was necessary to enable the railway to cross the street at a proper grade, that the town entered into no contract for the construction of the approach, nor furnished plans and specifications therefor, but had required in its franchise to the railway that suitable crossings and approaches should be maintained without expense to the town. *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.*..... 395
2. **SAME — CHANGE OF ESTABLISHED GRADE — LIABILITY OF RAILROAD.** In an action for flooding lands by the obstruction of a water course, a railway company, which changed the street grade by constructing an approach to its tracks, thereby raising the street above the grade as established, and flooding the lands, cannot escape liability for

WATERS AND WATER COURSES—CONTINUED.

- consequential damages on the theory that an original grade in use was lower than the established grade and that the grade put in by the railway at the requirement of the town was in the nature of an original or initial grade, where it was higher than and as variant from the established grade as the original grade. *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.*..... 395
3. SAME. An approach to a railway embankment constructed in a town street so as to afford a crossing at grade, under the authority of the town, would not exempt the railway company from liability for injuries caused to private property, where the franchise itself, under which the authority was exercised, provided that the company should be liable for all loss, damage and expense arising out of any injury to the property of any person caused by the construction of such railway. *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.* 395
4. WATERS AND WATER COURSES — OBSTRUCTION — NEGLIGENCE — INSTRUCTIONS. An obstruction of a water course by building a railroad embankment so as to prevent the natural flow of the waters in their accustomed channel, and thereby overflow plaintiffs' premises, is wrongful as to plaintiffs, regardless of negligence; and hence an instruction should eliminate negligence in the construction as an element of the wrong complained of. *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.*..... 395
5. WATERS AND WATER COURSES—ACTION FOR OBSTRUCTION—ISSUES AND PROOF—INSTRUCTIONS. In an action for damages for the alleged obstruction of the natural flow of "surface" waters, an instruction on "surface and other waters" is not erroneous as enlarging the scope of the issues, where it is apparent from the complaint that "surface waters" was used to designate waters coming from a large area and flowing through a natural water course which crossed their premises; since a particular statement controls a general term, in case of conflict. *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.*..... 395
6. SAME—INSTRUCTIONS. In an action for overflowing lands by obstructing a water course, an instruction that "the drain provided by the defendant to take care of the waters of the stream . . . must have been sufficient to take care of and dispose of the waters flowing down the stream at times of any ordinary freshet, but need not have been sufficient to provide against an unprecedented flow of high water," is not an invasion of the province of the jury as a determination of a question of fact, but merely states the rule as to the measure of duty the law imposed upon the defendants with regard to the drain. *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.*..... 395

WATERS AND WATER COURSES—CONTINUED.

7. **WATERS AND WATER COURSES—OBSTRUCTION—DAMAGES — INSTRUCTIONS.** In an action for the wrongful obstruction of the natural flow of waters, instructions on the measure of damages are not objectionable as authorizing the jury to assess damages on a double basis, where on one cause of action recovery was allowed for the obstruction of the natural channel of a stream on one side of the plaintiffs' premises, and for the loss of use of the premises for two years next preceding the action, and in the other cause of action recovery was allowed for permanent injuries caused by waters being cast on plaintiffs' property by reason of elevation of the street grade on another side of the premises, and for loss of the use of the property for two years next preceding the action. *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.*..... 395

WHARVES:

Negligent maintenance of by city, see **MUNICIPAL CORPORATIONS**, 24, 25, 28.

WITNESSES:

See **DEPOSITIONS**.

Expert testimony as to custom in collection of check, see **BILLS AND NOTES**, 15.

1. **WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS.** An affidavit of a defendant that he and his deceased wife had conveyed away a tract of land, being admissible against him as a declaration against interest, would not be inadmissible against their children as hearsay; since whatever interest the children have comes through their deceased mother, and the alienation, if made by the parents, would be complete as against the children. *Margett v. Wilson* 98
2. **WITNESSES—CROSS-EXAMINATION.** In a prosecution for assault, the action of the court, in excluding cross-examination of the state's witnesses as to charges made that the defendant's mother was a claim jumper was not error, inasmuch as it was the duty of the court to restrict cross-examination of witnesses to the issues involved in the case. *State v. Ross*..... 218
3. **WITNESSES—IMPEACHMENT—FORMER TESTIMONY — EFFECT.** In an action to recover damages for personal injuries due to the negligence of the city in permitting a cross-walk on one of its streets to be in a dangerous and unsafe condition, the fact that, in another action by the plaintiff for injuries subsequently suffered through the negligence of a street car company, her testimony as to the extent of her injuries was different from that in the present action, merely affects her credibility, and would not overcome the findings of the

WITNESSES—CONTINUED.

trial court in her favor, where there was sufficient evidence as to the unsafe condition of the cross-walk and as to the extent of plaintiff's injuries. *Burke v. Seattle*..... 445

WORDS AND PHRASES:

Laws necessary for "support" of state government, see **STATUTES**, 2.
Exception from referendum of laws for "immediate" preservation of the public peace, etc., see **STATUTES**, 6, 13.

WORK AND LABOR:

Liens for work and materials, see **MECHANICS' LIENS**.

WRITINGS:

Requirements of statute of frauds, see **FRAUDS**, **STATUTE OF**.

WRITS:

See **INJUNCTION**; **MANDAMUS**.

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